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Supreme Court of the United States

OCTOBER TERM, 1936

No. 22

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

YOUNG'S MARKET COMPANY, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEES

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Supreme Court of the United States

OCTOBER TERM, 1936

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *et al.*, *Appellants*,

vs.

YOUNG'S MARKET COMPANY, *et al.*

No. 22

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court for the Southern District of California (R. 33) is reported in 12 Fed. Supp. 140.

Jurisdiction

The final decree of the Court below (R. 64) was entered October 9, 1935 (R. 71). An appeal to this Court was allowed January 7, 1936 (R. 71-72). The jurisdiction of this Court rests on Section 266 of the Judicial Code as amended by the Act of February 13, 1925, the decree below being by a specially constituted District Court of three Judges (Judicial Code, Section 266).

The Statute

This case involves the constitutionality of so much of the California Alcoholic Beverage Control Act (Chap. 330, Statutes of 1935) as imposes a license fee of $500 for the privilege of importing beer from outside the State (Sec. 5), and requires any importer of such beer to take out such a license to cover each and every place of business within the State at which he imports beer.[1]

Neither the Constitution nor the statutes of California forbid the manufacture, sale or use of intoxicating liquors. On the contrary, they permit its manufacture and sale by licensees upon the payment of license taxes or fees imposed by the Alcoholic Beverage Control Act. That Act provides for the issuance of different kinds of licenses.

Sec. 3 of the Act reads as follows:

> "Sec. 3. On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of the State Liquor Control Act, Chapter 558, Statutes of 1933. Any per-

[1]The appellees' bill of complaint by which the jurisdiction of the court below was invoked had annexed thereto as Exhibit A (R. 5 and R. 23) a copy of the Act in question incorporated in the bill with the same force and effect as if set out therein in full (Subdivision IV, R. 5). It was also set out in full in the Findings of Fact of the court below (Subdivision IV, R. 45). It has not been reproduced by the appellants in the printed record, having been set forth in full in the statement of jurisdiction (Jurisdictional Statement 10-55). The full text thereof is set out in the Appendix to this brief. References to the Act will be made both by reference to the Appendix and to the Jurisdictional Statement filed by the appellants in this Court.

son violating any provision of this section shall be guilty of a misdemeanor."

Sec. 2, (k) and (t), define an importer and wholesaler respectively as follows:

> "(k) 'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed.
>
> * * * * * * *
>
> "(t) 'Wholesale sale' or 'sale at wholesale' means a sale to any person for purposes of resale."

Among the licenses provided for are a "beer importer's license", for which the fee charged is $500, and a beer wholesaler's license, for which the fee is $50.[2] (Sec. 5, Item 8, Jurisdictional Statement, p. 15; Appendix, p. v.)

Sec. 6 provides in part as follows:

> "Sec. 6. Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges *and no others* [italics ours] at the premises for which issued during the year for which issued."
>
> * * * * * * *
>
> "(d) Any importer's license authorizes the person to whom issued to become an importer of

---

[2]The applicable statutory provisions are:

"Sec. 5. The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

"8. Beer importer's license ..... $500.00 per year

"13. Beer and wine wholesaler's license ..... 50.00 per year"

alcoholic beverages specified in the license and to export such alcoholic beverage."

* * * * * *

"(f) Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage."

It will thus be observed that the importer's tax is laid solely upon the privilege of importation and does not confer the right to sell, for which purpose the importer must take out the additional wholesaler's license provided for in the statute. The result is that a wholesaler of domestic beer may obtain a license for $50, while a person desiring to import and wholesale beer manufactured without the State must pay (1) a tax of $500 for the privilege of importing such beer and (2) the regular wholesaler's license fee of $50 for selling the beer so imported.[3]

The first paragraph of Sec. 7 (Jurisdictional Statement, p. 18, Appendix, p. viii), provides as follows:

"Sec. 7. Each license issued under this act shall be issued to a specific person, and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location."

Any wholesaler desiring to import beer for sale at wholesale is therefore required to take out a separate license

[3]Neither the wholesaler of domestic or imported beer may sell at retail, nor may the retailer import for sale (Sec. 3, 6, Jurisdictional Statement, pp. 14, 16; Appendix, pp. iv, vi).

for each separate location at which beer from other states is to be imported.

In addition to providing that any person importing beer, unless holding an importer's license, shall be guilty of a misdemeanor (Sec. 3, Jurisdictional Statement, p. 14; Appendix, p. iv), the Act creates the following additional restrictions and provides for the following additional penalties and forfeitures:

(1) Forbids any common or private carrier to "transport alcoholic beverages into the State" unless "such alcoholic beverages are to be consigned to a licensed importer" and makes it a misdemeanor to violate this provision (Sec. 49, Jurisdictional Statement, pp. 45-46; Appendix, p. xxxiv).

(2) Makes it a misdemeanor for any licensee to have upon the licensed premises "any alcoholic beverages other than the alcoholic beverages which such licensee is authorized to sell at such premises under the license or licenses issued therefor". (Sec. 51, Jurisdictional Statement, p. 46; Appendix, p. xxxiv), and authorizes the Board or its representative to seize and summarily destroy or to sell at public auction any alcoholic beverage found in any premises in violation of this section.[4]

(3) Provides that in the event of failure to pay any tax, interest or penalty imposed by the Act, judgment shall be entered against such delinquent in the Office of the County Clerk of Sacramento

[4]The effect of this is to subject to seizure any imported beer found in the possession of any importer-wholesaler who may have taken out a wholesaler's license but who has not taken out the importer's license provided for in the statute.

County, without trial, upon the filing of a certificate to that effect by the State Controller, upon which judgment execution may issue, as in the case of any other judgment (Sec. 31, Jurisdictional Statement, pp. 30-33; Appendix, p. xix).

The Twenty-first Amendment

The Twenty-first Amendment to the Constitution of the United States reads as follows:

"UNITED STATES CONSTITUTIONAL AMENDMENT

No. XXI.

Repeal of Eighteenth Amendment.

"§1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"§2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"§3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Statement of Case

Each of the appellees is a wholesaler of beer within the State of California, holding a wholesaler's license

enabling it to wholesale beer within that State. For more than one year prior to the bringing of their bill in the Court below, each of the appellees was engaged in the business of importing in interstate commerce by rail, beer manufactured either in the State of Wisconsin or the State of Missouri, the amounts of their respective business in such imported beer ranging from $25,000 per annum in the case of the appellee, Haas Baruch & Company (R. 15), to $400,000 per annum in the case of the appellees, Young's Market Company (R. 12), and Simon Levi Company, Ltd. (R. 13). For the privilege of further engaging in such importation, each of the appellees is required by the statute to pay an importer's license (in addition to its wholesaler's license) of $500 a year at each of the places at which such beer is imported. Appellee Simon Levi Company, Ltd. is engaged in the business of importing and receiving for delivery by rail Schlitz beer manufactured at Milwaukee, Wisconsin, at twelve separate places of business within the State, and is thus required, for the privilege of further engagement in such importation, to pay a tax of $6,000, in addition to a wholesaler's license fee at each of said points (R. 14).

Appellee Young's Market Company is engaged in the business described at three points in the State, requiring payment of license fees of $1,500 for the privilege of importing beer (R. 13).

Appellee Haas Baruch & Company is engaged in the business described at one place of business, appellee Koerber at one place of business, and appellees George P. and George S. Higgins at one place of business (R. 15-17).

The defendants Riley, Corbett, Stewart, Collins and Shontz together comprise the State Board of Equalization

of the State of California, referred to in the Act as the Board (Sec. 2, Jurisdictional Statement, p. 11; Appendix, p. ii) and, as such, are specifically charged with the duty of administering and enforcing the provisions of the Act and with the duty to "prescribe all necessary rules and regulations to carry out" its provisions (R. 4; Alcoholic Beverage Control Act, Sect. 38, Jurisdictional Statement, p. 39; Appendix, p. xxviii). In the performance of this duty, the Board has promulgated rules and regulations, including rules and regulations forbidding the delivery by any carrier, either common or private, of alcoholic beverages shipped into the state from outside, except to a licensed importer, and otherwise regulating conditions of such importation (R. 8). Defendant Merriam is the Governor of the State (R. 3); defendants Stout and Flickinger are, respectively, the Chief Beverage Control Officer and Chief Beverage Control Administrator charged with the duty of administering and enforcing the Act (R. 5). Defendant Webb is the Attorney General of the State charged with the enforcement of the Act in question (R. 5).

The bill alleges that the appellees and each of them have ordered, and intend to order in the future, shipments of beer brewed and manufactured outside the State of California to each of the places and points of business hereinbefore described, to be shipped to their several warehouses thereat, that the railway carriers whose services are required for interstate transportation for the purpose of making delivery at such points have been instructed by defendants not to deliver such shipments; that the delivery thereof, until the appellees shall have taken out at each of said points an importer's license, will be a violation of law, and that the defendants would thereupon cause said

railway carriers to be prosecuted therefor (Sec. XV, R. 18). The Bill further alleges that there are approximately thirty-four breweries in the State of California for the wholesaling of whose beer distributors are not required to pay an importer's license fee of $500, or any other similar tax or license fee (Sec. XVI, R. 18), being permitted to wholesale such beer under a wholesaler's license of $50. The Bill further alleges that their business will be seriously impaired, if not lost or destroyed, without continued engagement in the importation and sale of beer from outside the State; that relying upon provisions of the Constitution of the United States, the appellees have refused to apply for and obtain importers' licenses for each of their various places of business provided for in the Act; that unless restrained and enjoined by the Court the Board "will enforce against plaintiffs and others similarly situated each and all of the provisions of said Alcoholic Beverage Control Act." (Sec. XVI, R. 18-19.)

Charging that the provisions of said Act requiring the taking out of the aforesaid importer's license as a condition precedent to the importation for sale of beer manufactured outside the State, were in violation of Sec. 8 of Article I of the Constitution of the United States, of the Fourteenth Amendment to the Constitution of the United States and of Sec. 2 of Article IV of the Constitution, the appellees brought suit in the United States District Court for the Southern District of California to enjoin the State Board of Equalization of that State and its members from in any manner enforcing against these plaintiffs the provisions of said Act in so far as they affected the right of the plaintiffs to import and sell foreign beer within the State, or from proceeding under said Act against said appellees (R. 21-23).

Temporary injunction was also sought, the appellants (defendants below) interposing a return to an order to show cause (R. 24). Upon the hearing on application for temporary injunction, it was stipulated that the allegations of the Bill, including the allegation that the defendants have threatened to and unless enjoined will enforce all of the provisions of the Act against the appellees and others similarly situated were true, and it was further stipulated that the decree of the Court on temporary injunction "should be a final disposition of this cause without the necessity of further hearing or proof upon the allegations of said bill" (R. 42).

The Court accordingly found the facts as recited in the Bill, and as thus stipulated (R. 41-57), held the Act unconstitutional in so far as it required the appellees and each of them to take out an importer's license at each of the places of business at which it was intended to import beer (R. 57-64), and granted a permanent injunction restraining the appellants (defendants below) from

(*a*) enforcing against the plaintiffs the provisions of said Act:

(*b*) collecting or attempting to collect from the plaintiffs the beer importers' license fees imposed by the Act;

(*c*) instituting or causing to be instituted any prosecution or proceeding, civil or criminal, to enforce any of the provisions of the Act;

(*d*) imposing or attempting to impose any of the penalties of said Act;

(*e*) seizing or attempting to seize any property of the plaintiffs or forfeiting or attempting to forfeit to the State any beer imported into the State for failure to pay said importer's license fee or to procure said license;

(*f*) and interfering with or attempting to prevent any private or common carrier from transporting beer into the State of California, for the sole reason that it was consigned to a person who had not obtained such beer importer's license (R. 62, 63).

From this decree appellants have appealed.

SUMMARY OF ARGUMENT

POINT I—The tax is one imposed solely upon the privilege of engaging in interstate commerce, the effect of which is to discriminate in favor of domestic beer and its wholesalers and against beer received from without the state and its wholesalers.

POINT II—The effect of the Twenty-first Amendment was not to free all liquor legislation of the states, whether wet or dry, from all constitutional limitations arising under the commerce clause in the exercise of the police power of the states.

1. The Twenty-first Amendment is not a grant of power to the states but a limitation upon the restrictions upon the exercise of the state's police power contained in other provisions of the Federal Constitution. The question is the extent to which the application of such restrictions has been removed.

2. The inevitable consequences of appellants' contention that the effect of the Twenty-first Amendment was to free all liquor legislation of the states from all constitutional limitations arising from any other provision of the Constitution or from the Commerce Clause alone are such as to repel its acceptance in the absence of completely convincing evidence that such was its purpose.

3. The historical background of the Amendment lends no support to the contention made but on the contrary requires its rejection.

POINT III—The Twenty-first Amendment does not remove state liquor legislation from the operation of the established principle that matters which are admittedly within the sphere of state power may nevertheless not be so regulated as to discriminate against the products of other states and their manufacturers and dealers, and the Act is therefore invalid.

1. The states may not under the Webb-Kenyon Act and the Twenty-first Amendment exercise their police power so as to discriminate against the products of other states.

2. The discriminatory effect of the California tax is not cured by the tax upon domestic manufacturers.

POINT IV—The act is invalid because it denies to appellees the equal protection of the laws.

POINT V—Finding XV of the court below is fully supported by the record.

ARGUMENT

POINT I

THE TAX IS ONE IMPOSED SOLELY UPON THE PRIVILEGE OF ENGAGING IN INTERSTATE COMMERCE, THE EFFECT OF WHICH IS TO DISCRIMINATE IN FAVOR OF DOMESTIC BEER AND ITS WHOLESALERS AND AGAINST BEER RECEIVED FROM WITHOUT THE STATE AND ITS WHOLESALERS.

The tax is clearly and on its face a tax imposed solely on the privilege of engaging in interstate commerce. The statute in express terms provides that the licenses provided for shall authorize the persons to whom issued to exercise the rights and privileges defined therein and "no others". An importer is defined as a person bringing alcoholic beverages into the state from outside the state and into whose possession they first come (Section 2(k). Jurisdictional Statement, p. 12; Appendix, p. iii). A wholesaler is defined as a person, other than a manufacturer or rectifier, selling alcoholic beverages at wholesale (Sec. 2 (s) and (t), Jurisdictional Statement, p. 13; Appendix, p. iv). The importer's license, for which a license fee of $500 is imposed, authorizes the holder only to bring alcoholic beverages into the state and to export the same from the state, and confers upon him no other privilege, not even the privilege of selling within the state beverages so brought in (Sec. 6 (d), Jurisdictional Statement, p. 15; Appendix, p. vii). This is so because Section 6 provides that a person to whom an importer's license is issued may exercise the privilege of importation only and no other

(Sec. 6, Jurisdictional Statement, p. 16; Appendix, p. vii). There may therefore be no question but that the tax imposed is a tax imposed solely upon the privilege of engaging in interstate commerce, *i.e.*, bringing beer into the state from the outside. As such it is both a tax and a burden upon interstate commerce[1], whether permissible under the Twenty-first Amendment or not.

In order to sell such imported beer within the state the importer must in addition take out a wholesaler's license. As said in *Brown* v. *Maryland*, 12 Wheat. 419, 447:

> "Sale is the object of importation, and it is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself."[2]

The appellees are wholesalers of beer manufactured outside the state. It is brought in by them solely for purposes of sale. They are wholesalers of imported beer. That is their business. The tax is not confined to those who import for export only but applies to those who import for sale at wholesale within the state as well. It was intended so to apply. In order to sell the beer, for the privilege of whose importation the appellees are required to

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[1] *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Asher* v. *Texas*, 128 U. S. 129; *Brennan* v. *City of Titusville*, 153 U. S. 289; *Stockard* v. *Morgan*, 185 U. S. 27; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Norfolk & W. Ry.* v. *Sims*, 191 U. S. 441; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Stewart* v. *Michigan*, 232 U. S. 665; *Davis* v. *Virginia*, 236 U. S. 697; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325.

[2] While this was said in a case involving the imposition of an occupation tax upon importation of foreign goods, it is as true when applied to an importer of goods made within another state.

pay a license tax of $500, they are also required to take out the ordinary wholesaler's license, for which the license fee is $50. The wholesaler of imported beer is therefore required to take out two licenses and pay a tax of $550 while the wholesaler of domestic beer is required to pay but $50. The only difference between the two is the origin of the beer, one being of interstate origin and the other of domestic origin. It may be said that a person holding a wholesaler's license but not an import license may wholesale either foreign beer or domestic beer, and this is true. But the import wholesaler is nevertheless a wholesaler. It is only for the purpose of wholesaling that he imports. The tax therefore is not only one exacted exclusively for the privilege of engaging in interstate commerce, but one the effect of which is to discriminate in favor of domestic beer and a wholesaler thereof and against out-state beer and the wholesaler thereof, the sole ground of the discrimination being that the latter is engaged in the wholesale distribution of beer brought into the state by him from the outside.

In determining the validity of a state law, whether enacted in the exercise of the taxing power, police power, or both, the court will consider its practical operation and effect. *Mountain Timber Company* v. *Washington*, 243 U. S. 219, 237. In its practical operation and effect the tax is not only one imposed upon the privilege of engaging in interstate commerce, but one which discriminates against the import wholesaler and in favor of the domestic wholesaler by requiring the former to pay a higher tax than the latter. That such is its practical operation and effect cannot be successfully denied.

POINT II

THE EFFECT OF THE TWENTY-FIRST AMENDMENT WAS NOT TO FREE ALL LIQUOR LEGISLATION OF THE STATES, WHETHER WET OR DRY, FROM ALL CONSTITUTIONAL LIMITATIONS ARISING UNDER THE COMMERCE CLAUSE IN THE EXERCISE OF THE POLICE POWER OF THE STATES.

1. The Twenty-first Amendment is not a grant of power to the States but a limitation upon the restrictions upon the exercise of the State's police power contained in other provisions of the Federal Constitution. The question is the extent to which the application of such restrictions has been removed.

The Twenty-first Amendment is not a grant of power to the States. It is not in the nature of an enabling act conferring upon the States authority to legislate upon subjects theretofore withdrawn from their control. The Federal Constitution is not the source of the State's police power. Its exercise, however, is limited by various provisions of the Federal Constitution, such as the Commerce Clause, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities of Citizenship Clause, and the clause forbidding the exaction of import duties. The effect of the Twenty-first Amendment is not to confer upon the States affirmatively the power to legislate but to limit, to the extent provided for and intended by the Amendment, the application of other clauses of the Constitution which, except for the Amendment, would constitute a restraint upon the exercise of the State's police power.

The question is as to the extent to which such restrictions or limitations have been removed. In the last analysis the contention of the appellants is that all restrictions upon the exercise of the police power in respect of liquor have been removed and the States restored to their full sovereignty thereover just as though they were not members of the Federal Union. With this we disagree. Unless such is the effect of the Amendment, the question therefore is, to what extent the exercise of the State's police power is still limited by the Commerce or other Clauses of the Constitution.

The Amendment prohibits the "transportation or importation" of intoxicating liquors into a State for delivery or use in violation of its laws. Manifestly, this means in violation of a valid law of the State. The real question presented, therefore, is the extent to which the validity of such a law may still be tested by other provisions of the Constitution as construed by this Court.

Prior to the enactment of the Wilson Act, it was held that the police power of the State did not attach to intoxicating liquors brought into the State from the outside until after sale in the original package. *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100. To meet this situation the Wilson Act was passed. That Act was thereafter interpreted by this Court as not applying to shipments of liquor consigned to a person within a dry state or dry territory for his own personal use. *Rhodes* v. *Iowa*, 170 U. S. 412; *American Express Company* v. *Iowa*, 196 U. S. 133; *Heyman* v. *Southern Railway Company*, 203 U. S. 270; *Louisville & Nashville Railroad* v. *Cook Brewing Company*, 223 U. S. 70. To meet this situation the Webb-Kenyon Act was

passed. Both had a common purpose—to prevent the abuse of the use of the channels of interstate commerce to defeat the enforcement of State laws by removing, to the extent provided by those Acts, but only to such extent, the limitations upon the police power contained in other clauses of the Constitution, particularly the Commerce Clause. This it did under the Wilson Act, as construed by the Court, by subjecting intoxicating liquor to the exercise of the police power upon its arrival within the State for purposes of sale. Like the Twenty-first Amendment, the Wilson Act was not a grant of power to the State, but a limitation upon the restrictions of the Commerce Clause upon the police power, accomplished by subjecting intoxicating liquor to the police power of the State upon arrival for purposes of sale. *In re Rahrer*, 140 U. S. 545. The Court having held that the police power did not attach in respect of interstate liquor consigned to a person in the State, not for sale but for his own personal use, the effect of the Webb-Kenyon Act, and the only effect, was to subject interstate liquor to the exercise of the police power upon its arrival within the State, and thus prevent its transportation and delivery therein contrary to State law.[1] The purpose of the Twenty-first Amendment was to write into the Constitution, upon the repeal of the Eighteenth Amendment, the limitations upon the application of the police power contained in the Webb-Kenyon Act, but no farther.[2]

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[1]The effect of both statutes, therefore, was merely to subject intoxicating liquors to the police power earlier than they would have been subjected but for the passage of these Acts, by removing what would otherwise be the bar of the Commerce Clause thereto.

[2]That the foregoing is an accurate description of the purposes and effect of the Wilson Act and Webb-Kenyon Act, and of the relation of the Twenty-first Amendment thereto, see Point III, p. 57, *post*.

It is obvious that a mere acceleration of the point of time at which intoxicating liquors may become subject to the police power does not and cannot of itself remove limitations upon that power contained in other clauses of the Constitution, irrespective of the question as to whether the police power, exercised with due regard to such restrictions, has attached or not.

While the Wilson Act and the Webb-Kenyon Act had a common purpose, viz., acceleration of the time at which intoxicating liquor might become subject to the police power of the States, there is nothing either in the text of either of those Acts, nor in the construction placed upon them by the Supreme Court, that would warrant the contention that the effect of those laws was to remove *all* constitutional restrictions upon the exercise of the police power in respect of intoxicating liquor.

On the contrary, the Court held in *Scott* v. *Donald,* 165 U. S. 58, that, under the Wilson Act, the police powers of the State were still subject to the Commerce Clause to the extent that the State in regulating the sale of liquors could not discriminate against interstate commerce by discriminating against liquor coming into the State from the outside. This was not based upon the original package doctrine, which had been excluded from operation by the Wilson Act, or upon any question as to whether liquor, brought into the State, was subject to the police power, or not. It was based upon the broad doctrine so often reiterated by this Court in countless cases, that a State may not, in the exercise of the police power, even when it has attached, discriminate against articles of interstate commerce in favor of articles of domestic production.[4] There

[4]See Point III, p. 57, *post.*

is nothing in the legislative history of either of these Acts or their text, in the legislative history or text of the Twenty-first Amendment, or in the decisions of this Court, to warrant the contention that the effect of either of these Acts or of the Twenty-first Amendment, the purpose of which was to carry them into the Constitution, was to withdraw the exercise of the police power in respect of intoxicating liquor from *all* limitations thereon, contained in other clauses of the Constitution, including the Commerce Clause.

2. The inevitable consequences of appellant's contention that the effect of the Twenty-first Amendment was to free all liquor legislation of the states from all constitutional limitations arising from any other provision of the Constitution or from the Commerce Clause alone are such as to repel its acceptance in the absence of completely convincing evidence that such was its purpose.

In its last analysis the contention of the appellants is that the effect of the Twenty-first Amendment was to free all liquor legislation of the states from all restrictions upon the police power to be found in other provisions of the Constitution. Unless it can sustain this contention, this act is clearly bad for reasons hereinafter set forth (Point III, p. 57, *post*). At page 42 of the appellants' brief it is said that the intent of the Amendment is

> "to restore to the several States their full sovereignty in the control and handling of the liquor problem".

At page 19, it is said:

> "The effect of the 21st Amendment is to restore to the states their full, original sovereignty to deal

with intoxicating liquors within their boundaries as they see fit, free from any restrictions of interstate commerce."

If it be true that the state has been restored to its full sovereignty or, if not, has been relieved from all restrictions upon the exercise of its police power arising from the Commerce Clause, then it would be competent for a state, while permitting the manufacture and sale of liquor within its own borders, to prohibit the importation of liquor therein from outside the state, whether from other states or foreign countries. And this would follow whether the immunity claimed applies only to the Commerce Clause or to all other clauses of the Constitution. It is well settled that a state, under the guise of exercising its police power, may not enact legislation the purpose of which is either to retain the products of that state for the use of its own citizens, *West* v. *Kansas Natural Gas Company,* 221 U. S. 229; *Foster Packing Company* v. *Haydel,* 278 U. S. 1; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; or to favor its own products at the expense of products produced outside the state by prohibiting or limiting the introduction of the latter, *Hannibal & St. Jos. R. Co.* v. *Husen,* 95 U. S. 465; *Minnesota* v. *Barber,* 136 U. S. 313; *Walling* v. *Michigan,* 116 U. S. 446; *cf. Baldwin* v. *Seelig,* 294 U. S. 511. The sole basis of these decisions is the Commerce Clause. If, therefore, the restrictions of this clause upon the exercise of the police power have been wholly removed, a state, while permitting the manufacture and sale of intoxicating liquors within its own borders, as California has done, could prohibit altogether the importation of liquors from other states or from abroad. To permit this would be contrary to the whole scheme of the Constitution.

Moreover, if the Amendment has the effect asserted, a state, while permitting the manufacture and sale of liquor within its own borders, may prohibit its introduction from certain states and countries and permit its introduction from others. This is so because it is only the Commerce Clause which forbids such discrimination. This ~~act~~ Amendment by its terms applies equally to "importation" from foreign countries as to "transportation" from sister states. If the ~~act~~ Amendment is to be given the interpretation asserted, then a state, while permitting the manufacture and sale of intoxicating liquors within its own borders, could prohibit their importation from foreign countries. Only the Commerce Clause forbids.

These illustrations alone are sufficient to compel the rejection of the contention made.

It has also been held that the Commerce clause forbids a state from taxing articles or transactions in articles which had their origin in another state at a higher rate than that imposed on similar articles or transactions in articles of domestic origin because of the resulting burden upon, interference with and discrimination against interstate commerce. *Welton* v. *Missouri,* 91 U. S. 275; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Tiernan* v. *Rinker,* 102 U. S. 123; *Webber* v. *Virginia,* 103 U. S. 344; *Scott* v. *Donald,* 165 U. S. 58; *Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *Cf. Minnesota* v. *Barber,* 136 U. S. 313; *Brimmer* v. *Rebman,* 138 U. S. 78; *Voight* v. *Wright,* 141 U. S. 62; *Vance* v. *Vandercook Co.,* 170 U. S. 438; *Armour & Co.* v. *Virginia,* 246 U. S. 1; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421. The California act in question levies an excise tax of 62½ cents per barrel upon all beer (Section 23, Jurisdictional Statement, p. 23; Appendix, pp. xiii).

This tax applies equally to beer of domestic manufacture and to beer introduced into the state from the outside. As such it is clearly valid. If, however, the act sought to levy a tax of double this amount on beer brought into the state from the outside, it would be as clearly void under the authorities cited. If, however, the effect of the Amendment is to withdraw altogether the restrictions upon state power arising out of the Commerce Clause, such a discriminatory tax would be valid.

We have already pointed out that the Amendment by its terms prohibits the "importation" of liquor into the state in violation of its laws, as well as its "transportation". Obviously, the two words were not used synonymously. The former was intended to cover importation in the legal and technical sense *i.e.* importation from abroad. Section 10 of Article I of the Constitution prohibits any state, without the consent of Congress, from laying any imposts or duties on imports except as "absolutely necessary for executing its inspection laws". If the effect of the ~~act~~ Amendment as contended is to grant complete immunity to the extent of the subject matter covered, which covers importation from abroad as well as transportation from another state, it would be competent for a state to impose an import tax upon the importation of foreign liquor freed from this provision of the Constitution. Importation of such foreign liquor within a state without payment of an import tax exacted by state laws would be an importation for delivery or use in violation of the laws of the state, if by that is meant the mere existence on the statute books of a law duly enacted in the manner required by the state constitution. The appellees in this case are not importers of foreign liquors. They are, therefore, in no position to

urge the unconstitutionality of this statute as applied to the importers of foreign liquor to whom, however, it applies as well as to importers of liquor produced in another state. We are now, however, discussing the meaning of the Amendment and the effect of giving it the interpretation placed upon it by the appellants. If it has the meaning assigned to it, then clearly the prohibition contained in this section of the Constitution, as well as those arising from the Commerce Clause, has been removed in respect of all liquor legislation by the states. Obviously, the Amendment was not intended to be given any such interpretation.

It is unthinkable that either Congress or the people should have intended by this Amendment to produce the results inevitably resulting from the adoption of the state's contention. It is unthinkable that this Court will so construe it. The Constitution is to be construed as a whole and each clause given a scope and effect consistent with the nature and objects of the Federal Union and the provisions of all other parts of the instrument. *Prout* v. *Starr,* 188 U. S. 537, 543; Story, Com. Sec. 405; Willoughby, Const. Law, 2nd Ed., 1929, Sec. 40; *cf.* Sec. 42. This is as true of the Twenty-first Amendment as of any other amendment.

It is a well-recognized canon of statutory construction that a statute is not to be given an interpretation leading to absurd or grotesque results. The same principle is equally applicable to the interpretation of constitutional provisions, if not more so. The results flowing from the interpretation placed upon the Amendment by the appellants are not only absurd and grotesque but inconsistent with accepted principles of constitutional law which have been announced by this Court.

However broad or narrow the extent of immunity from other constitutional provisions conferred by the Twenty-first Amendment, that Amendment did not have the effect of removing liquor legislation from the reach of all other provisions of the Constitution or altogether from the reach of the Commerce Clause. Only most clear and convincing evidence that such was its intent would warrant the adoption of such an interpretation.

3. The historical background of the Amendment lends no support to the contention made but on the contrary requires its rejection.

a. THE APPLICABLE RULES OF CONSTITUTIONAL INTERPRETATION.

In *Evans* v. *Gore,* 253 U. S. 245, this Court had before it the question of construing an amendment to the Constitution in relation to other constitutional provisions contended to be inconsistent therewith. In construing the effect of this amendment it was said:

> "In *Knowlton* v. *Moore,* 178 U. S. 95, this court said: 'The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning.' This sound rule is as applicable to the Amendments as to the provisions of the original Constitution.

> "Let us turn then to the circumstances in which this Amendment was proposed and ratified and to the controversy it was intended to settle" (p. 259).

As this Court said in the above quoted case, let us turn to the controversy it was intended to settle, the safe way, in the construction of amendments, being, as stated in *Maxwell* v. *Dow,* 176 U. S. 581, 602, "to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expression, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted." Let us see what "the known condition of affairs" was that this amendment was designed to remedy. This condition can only be revealed in the history of the legislative enactments and the judicial decisions concerning this subject.

b. The relation between the Twenty-first Amendment and the Webb-Kenyon Act.

Language which may be thought wholly free from ambiguity in the abstract may, as applied to a given situation, become uncertain and difficult of construction. By its language the amendment limits its prohibition to the transportation into a state "in violation of the laws thereof." In violation of what laws of the state? What are the laws of the state? Within what sphere may the enactments of the state become laws?

Such are only a few of the questions that are instantly suggested in the construction of this Amendment. The language cannot be removed from the setting which gives it its cast. The purposes of its adoption, the objects sought

to be obtained, and the conditions sought to be remedied furnish the background for determining its meaning. If we are to take the language of Senator Borah, as used in the debates upon the proposed amendment in the Senate, and which fairly reflects the views of that body in its consideration of the same, we find the purpose expressed as follows:

> "All this (conditions arising from the inability of states to exercise their police powers upon interstate commerce) was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the states of incorporating it, permanently in the Constitution of the United States." (Vol. 76, Congressional Record, p. 4172.)

And well could this be the only view concerning the purpose of this Amendment in the light of its identity of language with the Webb-Kenyon Act. A comparison of the language of the Webb-Kenyon Act with the Twenty-first Amendment will reveal that the latter is but an epitome of the former, the words used being identical in all respects with the Webb-Kenyon Act save for the omission of unnecessary verbiage.

Section 2 of the Twenty-first Amendment reads as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Webb-Kenyon Act (37 Stat. 699 (1913); re-enacted, 49 Stat. 877 (1935), 27 U. S. C. § 122), omitting extraneous words,[1] reads as follows:

> "The shipment or transportation * * * of any * * * intoxicating liquor * * * from one State * * * into any other State * * * which said * * * intoxicating liquor is intended * * * to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State * * * is hereby prohibited."

At this point the views of appellants and appellees are in entire harmony. Appellants in their argument (p. 35) state: "The Webb-Kenyon Act is the congressional prototype of the Twenty-first Amendment." No claim is, or fairly could be, made by appellants that under the Twenty-first Amendment the power of the state is any broader or different than the power which it had previous to the Eighteenth Amendment under the Webb-Kenyon Act. It is in the purposes which were sought to be accomplished by the

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[1]The Webb-Kenyon Act in full reads as follows:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Webb-Kenyon Act and by the Twenty-first Amendment and the effect which is to be given to the Amendment that the views of the parties to this appeal conflict.

c. THE EFFECT OF THE COMMERCE CLAUSE PRIOR TO THE WILSON ACT IN PREVENTING THE STATES FROM SUBJECTING INTERSTATE COMMERCE IN LIQUOR TO NON-DISCRIMINATORY REGULATION.

For more than fifty years following the adoption of our Constitution, numerous states, through their legislative acts, expressed a determined policy of control over the liquor traffic. Until within a few years of the close of the past century, states, such as Iowa and Kansas, had adopted legislation prohibiting absolutely the manufacture, transportation, and sale of intoxicating liquor. The power of a state to prohibit absolutely the manufacture of intoxicating liquor within its borders, and to deny to any person the use of his property for such purpose, was before this court in the year 1887 in *Mugler* v. *Kansas,* 123 U. S. 623, where it was held that no constitutional rights or guaranties were infringed by such legislation. No questions relating to interstate commerce in liquor were involved in that opinion, the court expressly holding that the contention that a state forbidding the manufacture of beer for exportation was interfering with interstate commerce was not before the court under the facts presented, and, therefore, no opinion was expressed thereon.

While it was thus recognized that a state had the power to prohibit absolutely all intrastate trade in liquors, the limitation resulting from the Commerce Clause upon the exercise of state power to carry out its policy of prohibi-

tion within its borders found expression in the case of *Bowman* v. *Chicago & Northwestern Railway,* 125 U. S. 465, decided in 1888. In that case a statute of the state of Iowa prohibited carriers from bringing intoxicating liquors within that state or transporting them between points within the state unless they were consigned to persons duly licensed to sell the same under the laws of the state. The Railway Company refused to accept a consignment of liquor from appellants at Chicago to be shipped to them in Iowa because they were not licensed to sell liquor in Iowa. Thereupon action was brought for damages occasioned by such refusal. The defense was asserted by the Railway Company that to carry the beer into Iowa would have been in violation of the state law. It was held by this Court that the provisions of the Iowa law restricted commerce and, therefore, were unconstitutional.

This case marked the first step in the recognition of the right of a non-resident to ship from another state in interstate commerce liquors consigned to within the state, to be used in violation of the statutes of such state, and the immunity of such commerce was quickly availed of to build up an extensive interstate business in liquors. The protection of interstate commerce was used not only to enable the carrying on of such interstate business, but to accomplish the sale of liquors after receipt thereof within the state but while within their original package. Thus, while a state had done all in its power to declare and enforce its policy of prohibition, it was entirely thwarted in its purpose through use of the channels of interstate commerce. That such protection extended to sales in the original packages was confirmed by this Court in the case of *Leisy* v. *Hardin,* 135 U. S. 100, decided two years after the *Bowman* case.

d. THE WILSON ACT.

(1) *The adoption of the Wilson Act.*

The clamor for protection against the use of such means to thwart a dry state's policy was loud and immediate. The complaint was that the states had no shield to protect them in their own state policies. Search for means of satisfying such demand was not difficult. In the very opinion in which the immunity of the interstate business was so completely recognized, this Court pointed the way by which the evil might be remedied by reference to the language of the early *License Cases* in which it was said:

> "It may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union in order to effect its end, however desirable such regulation."

The response to the demand following this suggestion of the Court was, within four months after the decision in *Leisy* v. *Hardin,* expressed by Congress in the enactment of the Wilson Act, which provided as follows:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such

> State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise."

(2) *The constitutionality of the Wilson Act.*

Within two weeks after the adoption of the Wilson Act the state of Kansas arrested a person named Rahrer who was conducting a business of selling, within the state, in the original packages, intoxicating liquors manufactured outside the state. The unconstitutionality of the Act was asserted as a defense to the prosecution, and the challenge reached this Court in 1891 in *In re Rahrer,* 140 U. S. 545. The contention was then made that Congress had, by the Wilson Act, delegated its power to regulate commerce to the states, and that a power reposed in Congress by the Constitution was not subject to delegation. This Court disposed of the question adversely on the theory that no power was granted to the state by the Act; that the police powers of the state had at all times rested in it under its reserved powers, the Court saying:

> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. * * *

> 'The power to establish such regulations' (police regulations) as was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 'reaches everything within the territory of a State not surrendered to the national government.' But it was not thought in that case that the record presented any question of the invalidity of state laws, because repugnant to the power to regulate commerce among the States. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the *commercial power* and the *police power*, which 'though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them' " (pp. 564, 556).

Thus the states, in acting under the Wilson Act, were exercising no power conferred by that Act. The commercial power was held to reside in Congress, where it was placed by the Constitution, while the police power of the states was allowed by the Act simply to extend its effect over a field theretofore denied it because of the commerce protection.

e. THE WEBB-KENYON ACT.

(1) *The circumstances leading to the adoption of the Webb-Kenyon Act.*

The Wilson Act having now received the judicial approval of this Court, every need of a state for a shield to protect it against the defeat of its own policy regarding intoxicants through the introduction of liquors from other

states was thought satisfied. The problem was not so immediately solved. Seven years after the decision in the *Rahrer* case, the Act came back to this Court for construction in the case of *Rhodes* v. *Iowa,* 170 U. S. 412. The state of Iowa had prohibited the transportation of liquor, from either within or without the state, to consignees not duly authorized to sell liquor. The issue presented was whether a railroad employee could be punished for having moved within the state liquor from another state consigned to one not authorized to sell it. The troublesome question arose out of the construction to be given the word "arrival" as used in the Act. It was held that "arrival" meant completion of the transportation within the state and delivery to the consignee, and that until the interstate transaction had been consummated by delivery to the consignee, the state was powerless to interfere therewith, even in a non-discriminatory manner.

The result of this decision was that the evils sought to be curbed by the passage of the Act were only partially met. It is true that a state was permitted to prohibit[1] or tax[2] the sale of liquor brought in from other states or from foreign countries,[3] even though in the original package. Under the Act the state could require all liquor, including liquor from other states, to be sold in the first place to a state dispensary[4] and the state could prohibit the personal solicitation of orders within the state for shipments from

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[1]*In re Rahrer,* 140 U. S. 545 (1891).

[2]*Pabst Brewing Company* v. *Crenshaw,* 198 U. S. 17 (1905); *Foppiano* v. *Speed,* 199 U. S. 501 (1905); *Phillips* v. *Mobile,* 208 U. S. 472 (1908).

[3]*De Bary* v. *Louisiana,* 227 U. S. 108 (1913).

[4]*Vance* v. *Vandercook Company,* 170 U. S. 438 (1898).

the outside.[5] But these extensions of state power were of little avail to stem the interstate flow of liquor protected by the decision in the *Rhodes* case and by subsequent decisions. Not only was the state unable to prevent carriers from bringing liquor into the state consigned to persons not authorized to sell it, but it could not regulate liquor coming in from other states until after it had been delivered to the consignee.[6] No special circumstances mitigated the application of this rule; it applied even though the consignee was known to be a habitual drunkard.[7] Neither could the state prevent c. o. d. sales of liquor to its residents.[8]

Two cases which were decided after the Webb-Kenyon Act was enacted, but which arose before, supply graphic descriptions of the flagrant and open manner in which the state's attempts to prohibit or regulate traffic in liquors within its own borders were defeated under the interpretation which had been placed upon the Wilson Act. The State of Kansas prohibited absolutely the manufacture and sale of intoxicating liquors. A citizen of a Kansas town bordering on Mississippi had conducted an illicit liquor business in Kansas. He found the local regulations troublesome and moved his business across the river, where he opened an office and a warehouse. There he received orders for liquor from persons in Kansas by telephone and mail, and made daily deliveries across the river by wagon. He even advertised in the Kansas newspapers. It was held in *Kirmeyer* v. *Kansas,* 236 U. S. 568 (1915), that under the

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[5]*Delamater* v. *South Dakota,* 205 U. S. 93 (1907).

[6]*Rhodes* v. *Iowa,* 170 U. S. 412; *Louisville & Nashville R.R. Company* v. *Cook Brewing Company,* 223 U. S. 70 (1912); *Heyman* v. *Southern Railway Co.,* 203 U. S. 270 (1906).

[7]*Adams Express Company* v. *Kentucky,* 214 U. S. 218 (1909).

[8]*American Express Company* v. *Iowa,* 196 U. S. 133 (1905).

Wilson Act the State of Kansas was powerless to remedy this situation. Similarly, in *Rossi* v. *Pennsylvania*, 238 U. S. 62 (1915), it was held that a person who made deliveries from Ohio into Pennsylvania by wagon was immune from a Pennsylvania law requiring all sellers of liquor to be licensed.

These numerous restrictions on the power of a state, even after the enactment of the Wilson Act, to effectuate its own policy with respect to liquor leave no doubt as to the type of situation which was intended to be remedied by the Webb-Kenyon Act. The two cases last cited arose just before the Webb-Kenyon Act was adopted. Other cases limiting the states' power in the manner just described preceded the adoption of the Webb-Kenyon Act by only a few years.[9] On the other hand, only one case decided under the Wilson Act invalidated state regulation because it was discriminatory, and that case was decided sixteen years before the enactment of the Webb-Kenyon Act. *Scott* v. *Donald*, 165 U. S. 58 (1897). In that case the liquor dispensary statute of the State of South Carolina was held invalid because of particular features of the system which were discriminatory. These features consisted of a provision which limited the profit which the dispensary might make from dealing in local wines without similar restriction with respect to foreign wines, a provision that the State Board should give preference in purchases to domestic products, and a provision that the State Board should sell its impure liquors in other states. It can hardly be thought that the court's invalidation of discriminations of this kind,

[9] *Adams Express Company* v. *Kentucky*, 214 U. S. 218 (1909); *Louisville & Nashville Railroad* v. *Cook Brewing Company*, 223 U. S. 70 (1912); *American Express Company* v. *Iowa*, 196 U. S. 133 (1905).

seventeen years before the enactment of the Webb-Kenyon Act, was any part of the situation which caused the enactment of the Webb-Kenyon Act. That the invalidation of discriminations of the character in *Scott* v. *Donald* constituted no serious limitation to the power of that state to regulate its liquor traffic is brought out by the fact that in *Vance* v. *Vandercook Company,* 170 U. S. 438 (1898), the court sustained a South Carolina statute setting up a dispensary system substantially like that created by the statute involved in *Scott* v. *Donald,* with the discriminatory features removed.[10] On the other hand, in the *Vance* case the court invalidated a new minor discriminatory feature of the South Carolina Act, and in two later cases[11] it reasserted the principle that a state might not discriminate against interstate transactions in liquor even in its regulations of matters which had been subjected to state control by the Wilson Act, but found that the statutes presented in those two cases created no discrimination.

Thus it appears that under the Wilson Act the police power of the states, though attaching, could not be exercised to discriminate against foreign products, but that this limitation upon state power caused the invalidation

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[10]In the *Vance* case the court invalidated a new discrimination of a minor character in the South Carolina Act while sustaining the Act as a whole. This discrimination arose from a provision that shipments of intoxicating liquors from other states to residents of South Carolina for their own use could be made only after the resident should have submitted to a state chemist a sample and should have received from him a certificate, which should be good for only sixty days and might be used for only one importation. This particular provision was sought to be sustained as an inspection law, but the court had no trouble in finding that it was designed to discriminate against liquor from other states in favor of domestic liquor. It will be noted that this decision was fifteen years before the enactment of the Webb-Kenyon Act.

[11]*Reymann Brewing Company* v. *Brister,* 179 U. S. 445 (1900); *Brown-Forman Company* v. *Kentucky,* 217 U. S. 563 (1910).

of no state statute for a period of fifteen years before the enactment of the Webb-Kenyon Act. On the other hand, it appears that over the entire period from the enactment of the Wilson Act in 1890 until the enactment of the Webb-Kenyon Act in 1913, the court by repeated decisions invalidated state liquor legislation which operated in the same manner and without discrimination upon liquor of domestic and foreign origin. It is apparent, therefore, that the construction placed upon the Wilson Act by this Court in *Rhodes* v. *Iowa,* and not that placed thereon in *Scott* v. *Donald,* was the immediate and inducing cause of the Webb-Kenyon Act.

(2) *The adoption of the Webb-Kenyon Act.*

The evils sought to be remedied and the conditions under which they arose are reflected in the debates in Congress prior to the passage of the Webb-Kenyon Act wherein reference only was made to the situation growing out of the *Rhodes* v. *Iowa* case. It was said by Senator Kenyon:

> "Every state in which the traffic in liquors has been prohibited by law is deluged with whiskey sent in by people from other states under the shelter of the interstate commerce law. There are daily trainloads of liquors in bottles, jugs, and other packages sent into the state consigned to persons, real and fictitious, and every railway station and every express company office in the state are converted into the most extensive and active whiskey shops from which whiskey is openly distributed in great quantities. Liquor dealers in other states secure the names of all persons in a community, and through the mails flood them with advertisements of whiskey, with the most liberal and attractive proposi-

> tions for the sale and shipment of the same. Freed from the expense of the middleman, the distiller or dealer in other states is enabled to sell to the individual in the prohibition state at a less price than the purchaser formerly paid to the domestic whiskey dealer. It is evident that under such circumstances the prohibition law of a state is practically nullified, and intoxicating liquors are imposed upon its people against the will of the majority." (Vol. 49, Congressional Record, p. 761.)

Unto such a heritage was the Webb-Kenyon Act born.

The fallacy of the argument of appellants in attempting to use debates as a means to ascertain the intent behind a legislative enactment is well exemplified by the use which appellants make of their references to such debates upon the Webb-Kenyon Act. Appellant sets out a few extracts divorced entirely from the subject of the debate to support an unsound position. It is sought to be made to appear by appellants that the very question which now arises in the construction of the Twenty-first Amendment was debated in Congress under the Webb-Kenyon Act, and that over a strong protest the language used in the Webb-Kenyon Act was selected in order to permit a state to deal arbitrarily and discriminatorily with liquors manufactured outside its borders. To support this argument, reference is made to the bill in the form in which it emanated from the Judiciary Committee of the Senate. Neither the legislative history of the Act nor the debates concerning it furnish the slightest support for such position. A careful reading of the Congressional Record fails to disclose the slightest evidence to support the contention so made. On the contrary, such research discloses that the proposi-

tion is best stated in the language of Senator Kenyon who said;

> "Its purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders. It is the spirit of our times and the genius of our institutions that each state should exercise its police power free from impediments that might spring from a narrow construction of the interstate commerce clause. Where a state has determined that intoxicating liquors shall not be manufactured or sold within its borders, *is it not manifest that the citizens of other states should not be granted greater privileges in that state than its own citizenship enjoy?*" (Vol. 49, Congressional Record, p. 707.)

As set forth in the Appendix to Appellants' argument (pp. 95, 96) the bill as it emanated from the Senate Committee contained two sections: the first, with but slight change, was retained in the act adopted, the second, was omitted. The occasion for revising the original draft by eliminating the second section was not, as contended by appellants, to make discrimination by a state against out-of-state liquors possible, but to (1) avoid an apparent inconsistency between the two sections, and (2) remove possible doubts as to its constitutionality. As was said by Senator Sutherland (now Mr. Justice Sutherland):

> "Section 1 seeks to do precisely the same thing by legislation so worded as to obscure its real intent; in other words, section 2 does directly what section 1 does indirectly." (Vol. 49, Congressional Record, p. 2904.)

In the language of Senator Kenyon:

> "Now I think no lawyer who is honest with himself and perfectly frank will deny that there are very close constitutional questions involved in this bill, and especially as to section 2." (Vol. 49, Congressional Record, p. 707.)

And, as said by Senator Paynter:

> "Section 2 is inconsistent with Section 1, as this section allows intoxicating liquor to be seized upon arrival in a state, regardless of the question of intent of those who had a direct or indirect interest in it." (Vol. 49, Congressional Record, pp. 2687, 8.)

And by Senator Borah:

> "I do not believe the second section of the bill is constitutional. I believe it establishes a different rule and involves a different principle from that involved in the first section, and it was my purpose to state why I entertained that view. I shall not do so, however, in view of the fact that I understand the parties in charge of the bill are going to offer as a substitute for this bill the one that passed the House known as the Webb bill, and which is in effect the first section of this bill." (Vol. 49, Congressional Record, p. 2919.)

Because in the *Rhodes* case the Court had expressly refused to mark the boundaries of commerce and the extent to which Congress could go in defining what was or was not commerce, Congress, as evidenced by the foregoing debates, determined to avoid, if possible, constitutional doubts.

The views evidenced by the statements of the foregoing Senators in the debates are not selected or isolated state-

ments but are representative of the whole debates on this subject. Whatever differences of opinion may have existed between the Senators on the question of the constitutionality of the second section, one thing is placed beyond the shadow of a doubt and that is that by eliminating it from the bill Congress did not design the accomplishment of that for which appellants now contend. No suggestion of such purpose is found in any of the statements of the Senators on the subject.

Appellants also lay stress upon the veto message of President Taft, contending that the veto was based upon the recognition of the existence of the power in a state as contended for by appellants. This message is quoted in full as Appendix C (p. lii) to this brief. The purpose alleged by appellants finds no expression in the message at any point. The language quoted by appellants to sustain their contention is language used by President Taft to express his views that the Act was an unconstitutional delegation of commercial power, a contention that was rejected by this Court in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311.

(3) *The effect of the Webb-Kenyon Act in extending the police power of the States to aspects of interstate commerce in liquor which had theretofore been immune from any exercise of that power.*

As previously indicated the Twenty-first Amendment is but the Webb-Kenyon Act in constitutional form. Rules of construction would not permit the giving of a different meaning to the language employed in the Webb-Kenyon Act than is given to the language in the Twenty-first

Amendment. Language taken from a statute surely does not assume a new meaning because it is put in permanent form by constitutional amendment. The Webb-Kenyon Act being merely an extension of the principles of the Wilson Act, and so emphasized in the debates before Congress, it remained only for this Court to so declare it when the constitutionality of that Act came before it in the *Clark Distilling Co.* case, in which this Court said:

> "Reading the Webb-Kenyon Act in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught" (pp. 323, 324).

And, again:

> "As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, * * *" (p. 30).

In the earlier case of *Adams Express Company* v. *Kentucky*, 238 U. S. 190, this Court had said:

> "Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the

> transportation of liquors into the State to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution" (p. 199).

If the power exerted by a state over interstate commerce under the Wilson Act is identical with the power exerted under the Webb-Kenyon Act, can it be contended that such power could be exercised in a manner different under the latter Act than it could be exercised under the former? True, it is that the extent to which the power might be exercised over articles in interstate commerce was enlarged, but the power remained the same.

In *Scott* v. *Donald,* 165 U. S. 58, this Court said that this power might not be exercised by a state in a manner by which commerce in liquors produced without the state were effectively discriminated against. This was not because the Wilson Act expressed that the power should be exercised "to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory." Such would have been the limitation of the law on the power in any event, and no expression of Congress was needed to make it so. Indeed, the Court made only passing reference to this provision of the Wilson Act, and placed its decision squarely upon the reasoning and authority of *Walling* v. *Michigan,* 116 U. S. 446, *Minnesota* v. *Barber,* 136 U. S. 313, and *Brimmer* v. *Rebman,* 138 U. S. 78, to which cases it devoted five pages of its opinion. It was as an aid to the enforcement of the police power of the state that both these Acts were passed by Congress. To extend their effect beyond this

purpose is unwarranted by the language employed or the conditions bringing about their enactment. If it is police power, and police power alone, that a state may exercise over intoxicating liquors while actually within the channels of interstate commerce or after introduction into the state by such means, then all that was said in *Scott* v. *Donald*, in expressing a limitation upon such power as permitted to be exercised by the Wilson Act, remains of equal force in its application to such power as permitted to be exercised by the Webb-Kenyon Act. In this case it was said:

> "The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful" (p. 100).

Such was the view of those courts having occasion to pass upon the question of the validity of state laws sought to be sustained by the provisions of the Webb-Kenyon Act during the short interval between the passage of the Webb-Kenyon Act and National Prohibition.

In Brennen v. *Southern Express Co.*, 106 So. Car. 102, 90 S. E. 402, it is said:

> "The first question to be decided is: Did the statute law of this state, as it stood at the date of the transactions alleged in the complaint, and at the time of the decision in the circuit court, which was before

the prohibition law became effective, violate the federal Constitution by making an unlawful discrimination against liquors shipped into the state in interstate commerce? That question must be answered in the affirmative. At that time the state recognized liquor as a legitimate article of commerce by engaging in the importation and sale of it for profit. And there was no limit to the quantity which a citizen who patronized the dispensaries might buy and keep in his possession for personal use, and no limit to the number of purchases that might be made within any specified time. *There was therefore clearly a discrimination made in favor of liquors bought from the dispensaries and of persons who patronized the dispensaries.* The point was squarely decided in *Scott* v. *Donald,* 165 U. S. 58, 101, 17 Sup. Ct. 265, 272 (41 L. Ed. 632), where the court said: 'It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in and importing them from other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states.'

"The act of Congress of March 1, 1913, known as the Webb-Kenyon Act, does not affect the decision of the question; for, while that act does divest intoxicating liquors shipped into a state in violation of its laws of their interstate character and withdraws from them the protection of interstate commerce, it evidently contemplated the violation of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of

lawful commerce by the law of the state making such discriminations, nor the power to make unjust discriminations between its own citizens. Substantially the same thing was said in *Scott* v. *Donald* of the Wilson Act (Act Aug. 8, 1890, 26 Stat. 313, c. 728 [Comp. St. 1913, § 8738]), by which Congress made liquors shipped into a state subject to its laws after delivery thereof to the consignee. The principle there decided was reaffirmed in *Vance* v. *Vandercook,* 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100" (pp. 403, 404).

In *Evansville Brewing Ass'n* v. *Excise Commission,* (225 Fed. 204) the Court disposed of the contention that under the Webb-Kenyon Act a state is free to discriminate against liquors manufactured outside its jurisdiction in the following language:

"That the Wilson Act applies in favor of regulatory, as well as prohibitory, state legislation, and that state legislation that would be construed as an exercise of the revenue power of the state, when relating to a subject-matter other than intoxicating liquors, will be construed as an exercise of its police power, when it relates to intoxicating liquors, has been held, also, in the cases of *Vance* v. *Vandercook,* 170 U. S. 438, 42 L. ed. 1100, *Pabst Brewing Company* v. *Crenshaw,* 198 U. S. 17, 49 L. ed. 925, and *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445, 45 L. ed. 269. Under these cases, and since the passage of the Wilson law and the Webb-Kenyon law, the State of Alabama has the power to exact a license from the Alabama seller of beer made in another state and shipped into this state, if the license is for police purposes and works no unjust discrimination against the foreign made beer" (p. 209).

Just how appellants make use of the *Clark Distilling Co.* case in support of their argument to sustain the California statute is not readily understood. Quotation is made from that case which is in entire harmony with the construction placed upon the act by appellees. There was no discrimination involved. That statute forbade the manufacture, transportation, and sale of intoxicating liquors in the state of West Virginia. It did not forbid the use of such liquors. Whether the liquors transported were manufactured within or without the state mattered not in the prohibition against transportation or sale. Whether the transportation was intrastate or interstate was immaterial under the act. Both were prohibited. No contention is made by appellees in this case that a state might not, under the Twenty-first Amendment, prohibit entirely all manufacture, sale, and transportation of intoxicating liquors, or that such prohibition would not apply to domestic liquors as well as liquors sought to be transported into the state, whether use was made unlawful or not.

To make this case applicable to their argument, appellants first set up for appellees a position never taken by them and which was not before the court on the trial of this case. They seek to state the appellees' position in advance by saying that the same line of reasoning was urged by plaintiff in the *Clark Distilling Company* case as is urged by the plaintiff below in this case and followed by the lower court, stating in substance that it is the position of appellees that where there is no prohibition against use or purchase of intoxicating liquors, there may be no state law prohibiting their importation. It is much easier for the State to meet such an assumed position than to meet the position that appellee has taken throughout this

case. If the West Virginia statute involved in the *Clark Distilling* case had permitted, with or without restriction, the manufacture, sale, and transportation of intoxicating liquors but had denied the importation of all liquors into the state, the situation presented by this case would have been before the court in that case. There being no element of discrimination, no difference of treatment between domestic and foreign liquors, the case is useful on this appeal only because it discloses the Court's view that the principles of the Webb-Kenyon Act are but an extension of the same principles involved in the Wilson Act, and that the state in the exercise of its power is restrained by the same limitations under the former that it was under the latter.

Whether the construction given the Webb-Kenyon Act in the *Clark Distilling* case refuted the construction given in the *Adams Express Company* case, as stated by the appellants in their brief (pp. 36-37), is material to no question on this appeal. The issue here is not whether a state may deny the importation of intoxicating liquor without also denying the personal use of such liquor. That was all that was before the Court in those cases.

Appellants argue that if any doubt remained as to the extent of the application of the Webb-Kenyon Act in removing the protection of the Commerce Clause from interstate shipments, it was removed by this Court in the opinion rendered in *McCormick & Co.* v. *Brown,* 286 U. S. 131, that case again has no pertinency to any question before the court on this appeal. While the act of the State of West Virginia involved in the case regulated the sales of products containing alcohol, all that was there decided was that the holder of a federal permit was not relieved from compliance with the law exacting a state permit. There was no want

of uniformity in the application of the law to domestic and foreign products. A non-resident in making his sales within the state was required to obtain the same permit that was required of a resident making like sales within the state. That a state has the power to require a license of one doing business in the state though that business be wholly through interstate commerce channels, no one will doubt.

While reference is made by appellants to *Seaboard Air Line Railway* v. *North Carolina,* 245 U. S. 298, they place no reliance upon that case in support of their argument. *Rainier Brewing Co.* v. *Great Northern P. S. S. Co.,* 259 U. S. 150, cited by appellants, involved no question of discrimination, the laws of the state applying equally to intrastate and interstate commerce.

Thus, though all the cases cited by appellants in support of their construction of this act are of historical interest, they are of no benefit in the solution of the problem before the Court on this appeal in the use which appellants seek to make of them.

The purpose of the Webb-Kenyon Act being as indicated in its title "An Act Divesting Intoxicating Liquors of Interstate Character in Certain Cases," the manner in which a state may exercise its power over articles within the state, but which have been introduced into the state through the channels of interstate commerce, should be no greater or less under this Act than it was before its passage.

It was to avoid use of the channels of interstate commerce for the purposes previously indicated, and to prevent the immunity which would attach to such articles while in commerce, that this Act was passed. When the articles have emerged from commerce, whether there ever was a condition of complete immunity from state power by reason

of their having been in interstate commerce in their introduction into the state, should be wholly immaterial in determining the extent to which a state may exercise its police power after they have become commingled with the mass of property within the state.

If a state could not, before the enactment of the Wilson Act, the Webb-Kenyon Act, or the Twenty-first Amendment, impose a discriminatory license fee upon one engaged in handling liquors produced without the state, how does the power of the state, under the Wilson and the Webb-Kenyon Acts, enable a state to so discriminate after their passage?

Under the Webb-Kenyon Act and the Twenty-first Amendment, a state is enabled to exercise the same power in respect to liquors wholly within the channels of interstate commerce, that it could, before such Act and amendment, have exercised over such liquors only after they had moved out of such channels. The power is the same. The field of its exercise has simply been enlarged.

f. Appellants' argument based upon history of the adoption of the Twenty-First Amendment.

It is argued by appellants (p. 42) that it was the intention of Congress in proposing this Amendment to the States, "to restore to the several States their full sovereignty in the control and handling of the liquor problem." In support of such contention appellants select a few statements of members of the Senate made in the debate upon this proposal. The language selected is removed entirely from the language which precedes and which follows, and thus fails to disclose the subjects which were being discussed and the meaning which was intended by its use.

Appellees have set out more fully, in the Appendix to this argument, the statements made in connection with the quoted excerpts, and, from the entire debate, it is made to appear that what is now relied upon by appellants in support of their argument was said in reference to a subject having no relation to the purposes for which the language is now sought to be used.

From these debates it will appear that the language of Senator Blaine, quoted in the appellants' argument, was used in reference to the preservation of the right of a state to declare its own policy in reference to the regulation or prohibition of intoxicating liquors under its police power. The language of Senator Glass related to a subject entirely foreign to anything that would now throw any light upon the meaning of the Twenty-first Amendment. It related to an entirely different proposal, covering a guaranty against the return of the saloon, as expressed by him:

> "All I want is a constitutional guaranty against a return of this abominable saloon system of dispensing intoxicating liquors—that is all—and if we write it into the Constitution I assume that no State would ever even undertake to violate the text of the Constitution by licensing a saloon." (Vol. 76, Congressional Record, p. 4220.)

The controversy which arose on the debate of this proposal that related, not to whether a state should be free to impose restrictions or prohibitions of its choice upon liquors transported within its borders, but to whether the National Government should be retained in the enforcement field of prohibition. What was said in the debates in this connection must have reference to this subject. It can have reference to no other subject.

The language of Senator Glass:

> "So I have met the objection that we are undertaking to interfere with interstate commerce as between states which authorize the manufacture, transportation, and sale of liquors"

was not used in connection with any argument by him that the language of his proposal would in any way limit the power of a state over interstate commerce in liquors that was not in a like way limited by the proposal ultimately adopted and then pending before the Senate.

It is the contention of appellants that in the debates Senator Glass, by his proposed Amendment, was attempting to limit the power of the state over intoxicating liquor in interstate commerce in a way in which it was not limited by the proposal subsequently adopted; whereas, the fact is the proposal of Senator Glass, as stated by him, was not only to prohibit the shipment of liquor into dry states, but to prohibit the saloon as well. This is evidenced by the reply of Senator Glass to the inquiry of Senator Reed as to whether he (Senator Glass) would favor the striking from his proposal of the provisions relating to the concurrent power of the Federal Government in the enforcement of state prohibition, Senator Glass saying:

> "That being so, I should be perfectly willing to eliminate that one sentence from the measure. All I want is a constitutional guaranty against the return of this abominable saloon system of dispensing intoxicating liquors—that is all."

These debates yield no other light than that the Amendment proposal, then pending before Congress, was designed to guarantee the freedom of a state in the exer-

cise of its police powers upon liquors coming within its borders in interstate commerce. Both parties had pledged in their preceding campaign (1st) the repeal of the Eighteenth Amendment, and (2nd) a Constitutional guaranty that the states would have the right to pursue a policy of complete prohibition or regulation which could not be defeated by the repeal of the then effective Congressional Acts.

While the debates in the Senate upon the proposed amendment may not be resorted to as an aid to the construction of the meaning of that amendment, adopted not by the Senate but by the states themselves, yet, when those debates are examined, not even a suggestion is revealed that the purpose of such amendment was to enable the states to adopt a policy which would entirely prohibit interstate commerce in liquors while freely permitting intrastate commerce therein.

The criteria for determining the meaning of the language employed in this amendment is stated by the Court in *Maxwell* v. *Dow* (176 U. S. 581, 601):

> "What speeches were made by other Senators, and by Representatives in the House, upon this subject is not stated by counsel nor does he state what construction was given to it, if any, by other Members of Congress. It is clear that what is said in Congress upon such occasion may, or may not, express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed Constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the Members voted in adopting it. *United States* v. *Trans. Missouri Freight Association,* 166 U. S. 290, 318; *Dunlap* v. *United States,* 173 U. S. 65, 75.

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expression, in a way so far as is reasonably possible, to forward the known purpose of object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit."

POINT III

THE TWENTY-FIRST AMENDMENT DOES NOT REMOVE STATE LIQUOR LEGISLATION FROM THE OPERATION OF THE ESTABLISHED PRINCIPLE THAT MATTERS WHICH ARE ADMITTEDLY WITHIN THE SPHERE OF STATE POWER MAY NEVERTHELESS NOT BE SO REGULATED AS TO DISCRIMINATE AGAINST THE PRODUCTS OF OTHER STATES AND THEIR MANUFACTURERS AND DEALERS, AND THE ACT IS THEREFORE INVALID.

The effect of the Amendment was, like that of the Webb-Kenyon Act, to subject intoxicating liquor to the police power of the state upon its arrival therein. For this purpose it may be subjected to any legitimate exercise of the police power. Unless, however, the effect of the Amendment was to remove all limitations upon its exercise to be found in other sections of the Constitution, including the Commerce Clause, the mere fact that the state shall have legislated upon the subject is not enough. The validity of its legislation must still be tested by those principles governing the exercise of the state's power in respect of articles of interstate commerce which have become subjected to the police power, and of regulation of dealers therein. But for the Amendment, the police power would not attach until sale in the original package. By reason of the Amendment it attaches upon arrival within the State, but the time when it attaches throws no light upon the validity of the Act.

1. The states may not under the Webb-Kenyon Act and the Twenty-first Amendment exercise their police power so as to discriminate against the products of other states.

a. DECISIONS OF THIS COURT INVOLVING STATE LIQUOR LEGISLATION.

The question is not when the police power or other powers of the state attach, but what constitutes a valid exercise of them. This is made plain by the cases hereinbefore cited, and particularly by the decision in *Scott* v. *Donald, supra,* 165 U. S. 58. In that case the Court held that the Wilson Act had not so far removed the restrictions upon the police power arising from the Commerce Clause as to permit a state to discriminate in favor of liquor of home manufacture and against liquor from the outside. The question went to the scope of the police power as restrained by other provisions of the Constitution, not to the time at which it attached. This case has never been overruled. There is nothing in the history of succeeding Acts, of the Twenty-first Amendment, or the opinions of this Court, to warrant the suggestion that it is not equally applicable to an attempted exercise of the police power under color of the protection of the Twenty-first Amendment. There is no difference in principle between discriminating against foreign-made liquor through complete prohibition, while permitting sale of domestic liquor, and discriminating against the latter through the exaction of a tax imposed upon the sellers thereof, not imposed upon the sellers of domestic liquor.

A state may prohibit the manufacture of liquor from any source of supply. When it does so there is little room for the application of the principle now under discussion. It was not involved in the *Clark Distilling* case, upon which appellants place so much reliance. That case related to the liquor legislation of a bone dry state. The Act in question prohibited transportation and delivery by a common carrier within the state of all liquor, whether moving in interstate or intrastate commerce. The Court held this Act to be good as an exercise of the police power in aid of the enforcement of its liquor policy and laws. No discrimination was involved, but if the law of West Virginia, reviewed in that case, had forbade the transportation and delivery within the state of all liquor coming from the outside, but permitted such transportation and delivery of liquor produced within the state, is it conceivable that the Court would have sustained the Act as being one within the reach of the Webb-Kenyon law? Certainly not.

The West Virginia statute involved in the *Clark Distilling* case also made an exception in favor of both the transportation, use, and sale of grain alcohol by druggists. This exception applied equally to grain alcohol of home origin and of foreign origin. If, while permitting the sale of grain alcohol of domestic origin, under the conditions imposed, it had prohibited the transportation, delivery or sale of grain alcohol of foreign origin, or had imposed a higher license fee upon a druggist selling the latter, as compared with one selling the former, is it conceivable that such discrimination would have been held to be within the police power of the state? We think not. Under the Webb-Kenyon Act, as under the Twenty-first Amendment, such grain alcohol of foreign production

would be subject to the police power of the state upon its arrival therein, but this would not make it so immune from the limitations imposed by the Commerce Clause upon the exercise of the police power as to permit of such discrimination.

A state may prohibit the sale of alcoholic beverages altogether, but when it permits them it may not impose one set of conditions for the sale of liquors of domestic origin and another and more onerous set of conditions for the sale of liquors produced outside the state. This is not a legitimate exercise of the police power but a statute directly burdening and interfering with interstate commerce in respects not removed from the operation of the Commerce Clause either by the Webb-Kenyon Act or by the Amendment.

Neither the Webb-Kenyon Act nor the Amendment applies only to states which are wholly dry. It applies equally to those which permit the sale of intoxicating liquors, in the sense that in either case liquor from outside the state becomes subject to the police power upon its arrival therein. It is plain, however, that while the effect is to subject liquors from outside the state to the exercise of the police power at the same time in both cases, that may well be a valid exercise of the police power when imposed by a dry state which would not be when imposed by a state permitting the sale of such liquor within its borders. Nor is the question one of degree. Where sale is permitted, the conditions imposed therefor must be the same as applied to all liquor, irrespective of its origin, otherwise the Act is not a legitimate exercise of the police power but an invasion of the rights of other states to send their goods into another for sale there upon conditions no more onerous than those imposed in the state of receipt.

In the exercise of its power to regulate the liquor traffic within its borders, the state is free to make any provision reasonably appropriate for its regulation. It may require a carrier to keep records of all deliveries, whether of liquor from within the State or without. *Seaboard Air Line Railway* v. *North Carolina,* 245 U. S. 298. It may require reports. It may subject to visitation all persons engaged in the business, to inspection, as well as require inspection of the liquor itself, and impose any other regulation, the purpose of which is to enforce obedience to the law and prevent its evasion by subterfuge, and is reasonably adapted to these ends. *Turner* v. *Maryland,* 107 U. S. 38. It may not impose higher license fees or more onerous conditions upon the sale of liquor brought in from outside the State than that manufactured within it. Such a provision is not a legitimate exercise of the police power but a discriminatory burden and restriction upon and interference with interstate commerce. The Court so held in *Walling* v. *Michigan,* 116 U. S. 446. In that case a Michigan statute, which fixed a license fee for one engaged in the handling of foreign liquors greater than was imposed upon a dealer in domestic liquors, was held to be invalid and repugnant to the Commerce Clause of the Constitution. No protection being claimed by reason of the articles being employed in actual interstate commerce, the power of the state in the one situation should extend no further than in the other.

Of course, it will not do to cite decisions of this Court relating to intoxicating liquors which were rendered prior to the enactment of the Webb-Kenyon Act in support of a position taken in respect to the limitations upon state power after the enactment of that Act unless such decisions are cited with an understanding as to the limitations upon their

present effect. But when the sole question is whether the police power of the state may be exercised in a discriminatory manner upon liquors wholly without the channels of interstate commerce, how can the situation be said to differ before or after the passage of these Congressional Acts?

Under the present state of the law, intoxicating liquor is divested of its immunity as an article of interstate commerce by virtue of the Twenty-first Amendment. The case of *Walling* v. *Michigan* involved intoxicating liquor which it was conceded was subject to the exercise of the state's police power and immune from that special protection against state regulation which the Commerce Clause is deemed to bestow on transactions which are themselves part of interstate commerce.[1] It would appear, therefore, that the relative positions are identical, that case and this both involving liquor beyond the immunity afforded it while actually in the channels of interstate commerce. Upon this theory do the cases of *Walling* v. *Michigan,* 116 U. S.

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[1]The particular transaction involved in the *Walling* case was the solicitation of an order for beer to be shipped in from another state. At the date of this decision, however, such a transaction was not protected by the doctrine, later established by *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 (1887), and recently reasserted by this Court in *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325 (1925), that a state may not tax, even in a non-discriminatory manner, the soliciting of orders for goods to be shipped from outside the state. Neither was the transaction protected by the doctrine, established in *Leisy* v. *Hardin,* 135 U. S. 100 (1890), and confined to actual prohibition of sales in the original package in the more recent case of *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506 (1923), by which doctrine sales in the original package were protected from even non-discriminatory state regulation. Under this state of the law, therefore, the Court in the *Walling* case was faced, as is this Court in the present case, with the question of the effect of the Commerce Clause upon transactions admittedly subject to the exercise of the police power of the state.

446, and *Tiernan* v. *Rinker,* 102 U. S. 123, become authorities applicable to the law upon the questions involved. The only exception to this is in the case of liquors moving through the state in interstate commerce, concerning which this argument has no application.

In the case of *Walling* v. *Michigan,* this Court said:

> "The single question, now before us for consideration is, whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself, and without having reference to the Act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levelled against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton* v. *Missouri,* 91 U. S. 275, where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product, or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri. The same principle is announced in *Hinson* v. *Lott,* 8 Wall. 148; *Ward* v. *Maryland,* 12 Wall. 418; *Guy* v. *Baltimore,* 100 U. S. 434, 438; *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; *Webber* v. *Virginia,* 103 U. S. 344. A discriminating tax

imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States. * * *

"Many state decisions might also be cited in which the same doctrine is announced. Thus, in the case of *Higgins* v. *300 Casks of Lime,* 130 Mass. 1, 3, it is said: 'The result of all the decisions is, that the several states have no authority to prescribe different regulations in relation to the commerce in certain articles, dependent upon the states from which they are brought. This rule in no manner controls or limits the power of a State to enact appropriate health or inspection laws; for such laws are necessarily uniform, and are not dependent upon place.'" (pp. 454, 457).

In *Tiernan* v. *Rinker,* 102 U. S. 123, a Texas statute imposing a tax upon the sale of beer of foreign manufacture, but imposing no tax upon the sale of domestic beer, was held invalid even as applied to persons who were engaged in the retail sale of beer in quantities of less than one quart. The Court said:

"According to it [the doctrine of *Welton* v. *Missouri,* 91 U. S. 275], the statute of Texas is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors. A tax cannot be exacted for the sale of beer and wines when a [*sic*] foreign manufacture, if not exacted from their sale when of home manufacture" (p. 127).

b. Decisions of lower Federal courts.

Appellants in argument refer to six decisions of statutory three-judge courts, said to have passed upon the questions arising in this case since the adoption of the Twenty-first Amendment. Those cases are of value to this Court only insofar as they commend themselves on the strength of the reasoning employed. For such purpose, each case is analyzed in Appendix R (p. lix) to this brief with so much of the language set forth as is expressive of the views announced. It may be said that but one decided case, that of *Premier-Pabst Sales Company* v. *Grosscup*, 12 Fed. Supp. 970 (from which appeal was taken to this Court but which this Court disposed of without finding it necessary to pass upon the constitutional questions decided by the trial court), was determined adversely to the position of appellees herein, while the language of the courts and the decisions rendered in the cases of *Pacific Fruit and Produce Company* v. *Martin* (not yet officially reported), *Joseph Triner Corporation* v. *Arundel*, 11 Fed. Supp. 145, the concurring opinion of Circuit Judge Farris in *General Sales & Liquor Company* v. *Becker*, 14 Fed. Supp. 348, and the opinion below in this case, all reach conclusions sustaining the positions of appellees here taken.

c. Applicability of decisions of this Court forbidding dicrimination against foreign products other than liquor.

The very purpose of the Act, being to put articles while in interstate commerce in the position of articles which have

lost their immunity by coming to rest after commerce, should result in a construction which would permit the exercise of state power only to the same extent that it might have been exercised if the articles had been removed from commerce itself. This being true, the decisions of this Court holding invalid state laws which attempted to discriminatorily affect articles concededly subject to the exercise of the state's police power should apply with equal force when a state attempts to enact laws discriminatorily affecting intoxicating liquor in interstate commerce. Though milk shipped from Vermont to New York is subject to the full exercise of the police powers of the state after its emergence from interstate commerce, yet it may still be protected by the Commerce Clause of the Constitution if the State of New York attempts to direct discriminatory legislation against it because of its origin from the State of Vermont. *Baldwin* v. *Seelig,* 294 U. S. 511.

If the State of Tennessee attempts to impose a tax upon logs cut from the soil of other states, even though the logs have passed outside the channels of interstate commerce and are, as a part of the general mass of property of the state, subject to the laws thereof, the Commerce Clause of the Constitution nevertheless may be resorted to as a protection against the imposition of such a discriminatory tax. *Darnell* v. *Memphis,* 208 U. S. 113.

Appellants criticize the reliance of the trial court, in its opinion below, upon the cases of *Darnell & Son* v. *Memphis,* 208 U. S. 113, *Guy* v. *Maryland,* 100 U. S. 434, *Webber* v. *Virginia,* 103 U. S. 344, *Walling* v. *Michigan,* 116 U. S. 446, and *Baldwin* v. *Seelig,* 294 U. S. 511, and, as if to demonstrate that such cases have no application to the principles involved in this case, say that the *Darnell* case

relates to logs, the *Guy* case to potatoes, the *Webber* case to sewing machines, the *Baldwin* case to milk, and that the *Walling* case, although relating to liquor, was decided before the Wilson and the Webb-Kenyon Acts.

To attempt a distinction upon this ground merely fails to recognize the purpose for which the cases are used in support of the opinion. The fact that in the cited cases the court was dealing with a statute regulating milk, taxing logs, or taxing potatoes, and in this case with a statute regulating intoxicating liquor, would be a very ready distinction to avoid their application here if the power exercised by the state bore any reasonable relation to the subject-matter of the regulation. However, if, as is contended by appellees, the only power of a state over intoxicating liquor in interstate commerce is its power to enact police regulations, to promote the objects for which such power may be properly exercised, then it matters not whether the subject-matter be intoxicating liquor or milk. If it may be claimed for those subjects, entirely out of interstate commerce channels, the protection of the commerce clause, such cases should become of equal application whether the subject of regulation be intoxicating liquor or milk. In other words, if the police power of a state may not, as held in *Baldwin* v. *Seelig,* be availed of by a state to secure advantages for its domestic products, it should matter not whether such police power was sought to be so availed of upon the subject of milk or intoxicating liquor.

Certainly there is no more reason for saying that the discouragement of commercial intercourse in intoxicating liquor is a valid exercise of the police power when by so doing the state is seeking to encourage the traffic in its own domestic liquors. It is, of course, within the proper realm

of police power for a state to discourage traffic in intoxicating liquor, but it is not within the objects of police power for a state to discourage only interstate traffic in such liquors to the advantage of intrastate traffic.

This Court, in expressing its views and holding invalid legislation of the State of New York in restricting the sale of milk produced in another state, uses the very illustration presented in this case to demonstrate such legislation to be invalid. This is the language of this Court in the *Baldwin* v. *Seelig* case upon the question presented by this appeal:

> "In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass" (p. 528).

Further discussing the limitations upon the exercise of state police power, it is said:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what

> is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended" (p. 527).

It must be clearly kept in mind that this Court, in the foregoing cases, was dealing with a subject entirely out of the channels of interstate commerce, and thus as much subject to regulation under the police powers of the State as are intoxicating liquors in the channels of interstate commerce. The only difference between intoxicating liquors and other articles of commerce is that the former are interrupted in their interstate journey at the border of the state of destination and, by the Congressional Acts and the Twenty-first Amendment, are divested of their interstate commerce immunity, while that immunity persists with the latter until its interstate journey is at an end.

The state may in the exercise of its police powers enact inspection or quarantine laws regardless of the interstate character of the commerce to which they apply. *Foster* v. *Master and Wardens of The Port of New Orleans,* 94 U. S. 246; *Turner* v. *Maryland,* 107 U. S. 38; *Smith* v. *St. Louis, etc. Ry. Co.,* 181 U. S. 248. The police power for these purposes attaches to the subject matter at the very moment it reaches the border of the state, yet the restraint of the commerce clause is such as to forbid the exercise of this power in a manner which discriminates against the products of other states in favor of products of domestic origin.

Voight v. *Wright,* 141 U. S. 62; *Minnesota* v. *Barber,* 136 U. S. 313, *Brimmer* v. *Rebman,* 138 U. S. 78; *Vance* v. *Vandercook Co.,* 170 U. S. 438; *Foote & Co.* v. *Stanley,* 232 U. S. 494; *Standard Oil Co.* v. *Graves,* 249 U. S. 389; *Texas Co.* v. *Brown,* 258 U. S. 466; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421; *cf. Hannibal & St. Jos. R. Co.* v. *Husen,* 95 U. S. 465. Thus, for example, in *Voight* v. *Wright, supra,* it was held that a Virginia statute which required the inspection of flour from other states was invalid because it required no inspection of domestic flour. The enactment of legislation providing for the inspection or quarantine of articles in interstate commerce is as clearly within the police powers of the state as is the enactment of legislation concerning intoxicating liquors; if in the former of these situations the power of the state does not extend to the enactment of legislation discriminating against products of other states, it clearly should not in the latter.

d. CONCLUSION AS TO THE POWER OF STATES TO DISCRIMINATE AGAINST PRODUCTS OF OTHER STATES.

Certain it is that the Twenty-first Amendment prohibits the introduction into a state of intoxicating liquors in violation of the laws thereof, but equally certain it is that a statute of a state is not to be accepted as the law of that state if in its passage the legislature exceeds the limitations upon its power as expressed in the Federal Constitution. The question is not: It there a statute of the state which purports to prohibit the introduction of such liquors into the state? The question is: Is such statute the law of the state?

If that statute by its terms selects as the object to be affected liquors manufactured outside the state, and seeks to direct that effect in a way which will embarrass or prohibit introduction into the state to the advantage of like liquors produced within the state, the question as to whether it is a law of the state is answered by the cases of *Scott* v. *Donald, Vance* v. *Vandercook,* and *Baldwin* v. *Seelig,* as well as the other authorities cited herein.

Again, let the position of appellees be not misunderstood: No protection of interstate commerce is asserted against the exercise of valid police regulations over the subject of intoxicating liquors. The state is as free to deal with such subjects in interstate channels as it is to deal with subjects originating within its borders, so long as it applies its regulations uniformly and without discrimination. The constitutional limitation here asserted by appellees against state action is not to secure favor for products in interstate commerce, or introduced into the state through such channels, (a favor that would otherwise attach to articles of interstate commerce) but to secure treatment of such articles uniform with treatment of like articles produced within the state. This construction of the Twenty-first Amendment is consonant with every purpose for which it was adopted, and this construction alone harmonizes the Twenty-first Amendment with Article I, Section 8, Clause 3.

If by any construction the two constitutional provisions can stand together, that is the construction that should be given by the Court. This principle is expressed by this Court in *Prout* v. *Starr,* 188 U. S. 537, as follows:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as

> one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war,—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations" (p. 543).

The Federal Government having its origin in the necessities of commerce, and that purpose alone being recognized by all who have spoken with authority on the subject as the one outstanding purpose in the minds of the framers of the Constitution, any contention that the state is supreme in the field of commerce should be given support only because no other construction could fairly be given the amendment. As was said by Daniel Webster whose language is quoted by this Court in *Guy* v. *Maryland,* 100 U. S. 434:

> "Over whatever other interests of the country this government may diffuse its benefits and blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessi-

ties of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system."

The construction contended for by appellees gives to the state every shield in the protection of its own policy that it ever demanded in the history of its struggle for relief against the evils of the liquor traffic. It prevents a state from doing that which it now seeks to do, of converting the shield into the sword. The use of its power as a sword is thus out of harmony with the genesis of our government. Against such construction is the contention of the appellants in this case, that the state is sovereign within its domain in dealing with intoxicating liquors and may not be restricted in the exercise of its power by anything contained in any of the provisions of the National Constitution.

Is a construction to be given this Amendment which would permit the state of California

1. To enact a law by the terms of which the shipment of all liquor into the state is prohibited, while permitting freely the manufacture and sale of liquor within its borders.

2. To permit the importation of liquor from every state in the Union save one which is prohibited.

3. To permit the importation of intoxicating liquors from the State of Kentucky alone, but condition the right of such importation upon the State of Kentucky passing an Act permitting the importation exclusively within that state of the wines of California.

4. To prohibit all importation of intoxicating liquors except those imported from Germany but condition the right

of importation of such liquors so long only as Germany admits the products of the State of California into that Nation without duty or impost.

5. To permit the importation of liquor manufactured by one concern to the exclusion of the liquor manufactured by every other concern in the United States.

6. To restrict the importation of liquor in interstate commerce to one railroad to the exclusion of all other carriers.

7. To limit the importation to such as may be made in a certain make of automobile or truck to the exclusion of any other means of conveyance.

Although the foregoing examples may appear to illustrate the extreme situation which may arise upon the appellants' construction of the amendment, yet, if, as appellants contend, the state is restrained by no provision of the National Constitution in exercising its powers over this subject, the assumed situations may readily become realities.

Laws of the several states and bills introduced in the legislature which are set out in the Appendix to this Argument are but suggestive of the form which state legislation will take should a construction such as appellants contend for prevail. Amid this commercial conflict between states, the language of the court in *State* v. *North,* 27 Mo. 464, cited with approval by this Court in *Walling* v. *Michigan,* 116 U. S. 446, resounds with prophetic vision:

> "From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the states, in the exercise of the right of taxation, to discriminate between products of this State and those manufactured in

our sister states. * * * But, whatever may be the motive for the tax, whether revenue, restriction, retaliation or protection of domestic manufacturers, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports, and its exercise by the states is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the states be exercised than that of imposing discriminating taxes or duties on imports from other states? Whatever may be the motive for such taxes, they can not fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences" (pp. 457, 458).

2. The discriminatory effect of the California tax is not cured by the tax upon domestic manufacturers.

While it is appellants' primary contention that the Twenty-first Amendment entirely removes the protection of the Commerce Clause from liquor, they nevertheless also contend that the tax in question does not discriminate against beer from outside the state. Appellants do not deny, as they could not, that although the importer's tax is in name upon a different class of persons than the wholesaler's tax, it is in effect a tax imposed upon the privilege of selling foreign beers within the state at wholesale. Appellants do not deny that whereas the California Act imposes a tax of only $50 upon the privilege of selling domestic beer at wholesale, it in effect imposes a tax of eleven times that

amount upon the privilege of selling foreign beer at wholesale. On the contrary, appellants argue that nevertheless the tax upon importers of beers does not discriminate against foreign beer because, of the two "fountain heads" of beer within the state, the manufacturer and the importer, both are taxed.

The error of this argument is, in its simplest terms, that it compares the California tax upon the manufacturing and selling at wholesale of domestic beer with the California tax upon the selling at wholesale, alone, of foreign beer.

Without considering the absurdities to which such a test for an existence of discrimination would lead, and without considering decisions of this Court which compel the rejection of such a test, it is evident that appellants' argument overlooks the real nature of the taxes imposed by the California Act. These taxes are not taxes upon beer. They are taxes upon engaging in certain aspects of the beer business. The several different aspects of the beer business recognized by the California Act itself are beer manufacturing, beer importing, beer bottling, beer wholesaling, and beer retailing. Of course, beer importing is not in itself a classification of a separate business transaction in beer. It is rather a term used to indicate that a business transaction which may involve either domestic or foreign beer has in the particular case under question involved foreign beer. Thus, the California Act defines "importer" to mean the first person "in possession" within the state of beer brought in from outside. (Jurisdictional Statement, p. 8; Appendix, p. iii). Such a person may be either the agent of a foreign manufacturer for selling his beer at wholesale in California or an independent

wholesaler of beer manufactured outside of the state. The same business function, as to domestic beer, is performed either by one who acts as an agent for a domestic manufacturer for selling his beer at wholesale or by an independent wholesaler of domestic beer.

Looking at the nature of the beer business, therefore, it appears that there are, as recognized by the California Act, three distinct aspects of the beer business, manufacture (which includes bottling), selling at wholesale, and retailing, importing being only a name for the buying side of the wholesaler's business when he is dealing in foreign rather than domestic beer. Of the three steps, manufacturing, wholesaling and retailing, only wholesaling and retailing are as to both domestic and foreign beers within the jurisdiction of California to tax. It is hence necessary in determining whether the taxes imposed discriminate against transactions in foreign beer, to compare the amount of tax imposed upon domestic beer on the one hand and upon foreign beer on the other hand, as to those aspects of the business the privilege of engaging in which California may tax. No objection is here made to the retailing taxes, but it is apparent that to impose upon the selling at wholesale of foreign beer a tax eleven times the amount of the tax imposed upon the selling at wholesale of domestic beer constitutes a serious discrimination against foreign beer.

It is not appellees' position that the result of this tax would be to permit the domestic manufacturer or the wholesaler of domestic beer to make larger net profits than the foreign manufacturer or the wholesaler of foreign beer. Whether domestic or foreign beer will command a greater part of the market or whether the greater net margin of profit can be made from handling domestic or foreign beer

is, of course, not here in question. That will depend upon a great variety of factors which enter into the cost of manufacturing and marketing the different products and which affect the price at which they are sold. It is of no use, as the appellants seek to do, to show that a greater tax cost (so far as *California* taxes are concerned) in the selling at wholesale of foreign beers, is compensated for by a greater tax cost in the manufacture of domestic beers. California, as to domestic and foreign beers, has the power to affect only a limited part of the total costs involved in the entire process through which beer passes from manufacture to consumption. In so far as, as to that part, California gives preference to domestic beers as against foreign beers, it clearly discriminates against those foreign beers.

The appellants' argument is not only theoretically and practically unsound, as applied to this situation, but the inevitable consequences of their argument lead to such absurdities as to compel its rejection. If, as appellants contend, California has the power to equalize the tax burden upon domestic and foreign beers, it should obviously be required or at least permitted to take into consideration the amount of tax burdens imposed upon foreign beers at the place of manufacture. The amount of these taxes might differ in each of the forty-eight different states. Appellants' theory, therefore, might require that forty-eight different rates be prescribed for importers of foreign beers, one to apply to the importer of beer from each state. California beer likewise competes with beer from other countries, and it might become necessary for California to impose a larger importer's tax upon German beer than upon beer made in other countries because Germany has favored its brewers by exempting them from taxation.

Moreover, if the appellants' approach is to be accepted, there is no reason why California should be limited to equalizing tax burdens. It should likewise be permitted to equalize all burdens. It should take into consideration the varying costs of transportation to California, the varying costs of production in the different states, and thus assure that its taxes are so imposed as to enable domestic manufacturers of beer to make the same profit, or to offer their beer for sale at the same price, as foreign manufacturers, wherever located.

The argument on this point is, of course, one as to facts, the issue being simply whether, as a matter of fact, the tax imposed gives an "advantage to the product manufactured in [California], and to the manufacturers and dealers of that state". This was the test applied in *Walling* v. *Michigan,* 116 U. S. 446. That case is not only authority that a state may not discriminate against the products of other states, but in its facts is a close parallel to this case. That case involved a Michigan statute of 1875, which imposed a tax of $300 upon persons from out of the state who should sell or solicit the sale of liquors to be shipped into the state from places without it, but did not impose a similar tax upon persons selling or soliciting the sale of liquors manufactured in the state. This statute as applied to one who had solicited a sale of liquor to be shipped into the state from outside, was attacked upon the ground that it discriminated against interstate commerce.[1] The defense was raised that the discrimination was cured by another tax imposed by an act of 1881 of $500 upon manufacturers of liquor within the state. The defense was rejected. The court said:

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[1]See note, p. 62, *ante.*

> "Of course the act of 1875 does not assume to tax non-resident persons or firms for doing business in another State. They are subject to taxation in the States where they are located. It is the business of selling for such non-resident parties, or soliciting orders for them for sale in Michigan of liquors imported into the State, that is the object of taxation under the law; and any person engaged in those employments, or either of them, is subject to the tax of three hundred dollars per annum. Now, is such a tax or any tax imposed upon those who are engaged in the like employment for persons or firms located in Michigan, selling or soliciting orders for the sale of liquors manufactured in that State? Clearly not. * * * The tax imposed by the act of 1875 is not imposed on the same class of persons as is the tax imposed by the Act of 1881. That this must give an immense advantage to the product manufactured in Michigan, and to the manufacturers and dealers of that State, is perfectly manifest" (p. 459).

If appellants' argument is sound, then if California did not impose a tax upon importers, it would thereby discriminate against its own manufacturers. This was precisely the situation presented and the argument made to this court in *Brown-Forman Co. v. Kentucky,* 217 U. S. 563. That case involved a Kentucky statute which imposed an occupational tax upon persons engaged in the state in compounding, rectifying, adulterating or blending distilled spirits. The defendant, who was engaged in Kentucky in that business, had refused to pay the tax because, as he contended, there was no similar or compensating tax imposed upon liquor of foreign origin, and, therefore, as he contended, the state tax discriminated

in favor of interstate commerce, in violation of both the Commerce Clause and the Fourteenth Amendment. In rejecting this contention, the court said, at page 576:

> "Here the exaction is not upon the product at all, but upon the business of producing the product in the State. The same business carried on beyond the State could not have been subjected to a like tax. There has therefore been no arbitrary or capricious discrimination against the resident rectifier."

Appellants rely upon *Reymann Brewing Company* v. *Brister,* 179 U. S. 445. That case simply held that an excise tax upon all wholesalers within the state was not invalid because manufacturers within the state were allowed to sell at their plant in quantities of more than one gallon without paying a tax upon such sales. The very feature of that case which the court upheld would exist as to the California Act if the tax on importers were eliminated. The California Act would then, like the act in question in the *Reymann* case, require wholesalers, both within and without the state, to pay an equal tax but would permit the manufacturer to sell without the payment of any tax upon the privilege of selling, as distinguished from manufacturing. The *Reymann* case, therefore, presented the very situation which appellees claim should exist in California.

The problem here being considered is whether the California taxing scheme has the practical effect of discriminating between distributors who sell beer made within the state and those who sell imported beer. An identical taxing scheme of the state of Pennsylvania was characterized by this Court at its last term as so discriminating. *Premier-*

Pabst Sales Company v. *Grosscup,* No. 745.—October Term, 1935 (Decided May 18, 1936). The Pennsylvania statute there attacked imposed the following license fees on persons engaged in the named aspect of the beer business:

> "(a) In the case of a manufacturer, the license fee shall be one thousand ($1,000.00) dollars for each place of manufacture, and shall be paid to the board.
>
> (b) In the case of a distributor, the license fee shall be four hundred ($400.00) dollars, and shall be paid to the board.
>
> (c) In the case of an importing distributor, the license fee shall be nine hundred ($900.00) dollars, and shall be paid to the board."

It is seen that under that act, as under the California act, distributors (elsewhere defined as persons selling not for consumption on the premises where sold) of both domestic and foreign beer were required to pay a license fee, but a $500 larger fee was imposed upon a distributor who also imported than was imposed upon a distributor who did not import. And under the Pennsylvania statute as under the California act, a still larger license fee was imposed upon the manufacturer than upon the importing distributor. The Pennsylvania statute was attacked in this Court upon the same ground now urged against the California act. The Court did not consider the constitutional question because it appeared that plaintiff was without standing to present it, since he held no valid license and no license could be legally issued to him. The Court, nevertheless, in its statement of the facts of the case, said:

> "Premier-Pabst Sales Company, a Delaware corporation, is a distributor of beer made in Illinois and Wisconsin. Having secured a license issued under a statute of Pennsylvania enacted and amended in 1933, it engaged in business there. That statute was again amended by Act No. 398, approved July 18, 1935, which changed the licensing law *so as to discriminate between distributors who sold beer made within the State and those who sold imported beer.* The annual license fee of the former was made $400, and the penalty of the bond required of them was set at $1,000; the license fee of the latter was made $900, and the penalty of the bond to be given by them was set at $2,000."

Although appellees do not contend that the case referred to is a holding upon any issue here involved, they believe that this recent statement of the Court upon a matter constituting an issue of fact and so treated by this Court, is of weight.

Appellees do not deny that from the aspect of policing liquor both manufacturers and importers are the source of liquor within the state, and that if liquor from the two sources are to be policed effectively it is necesary to police foreign liquor in the hands of the importer. The tax in question has no relation to such legitimate ends however. The police problem of the state as to foreign beer is not the problem of policing the manufacture of foreign beer but of policing foreign beer after it has been manufactured and is attempted to be brought within the state. As held by this Court in *Seaboard Air Line Railway* v. *North Carolina,* 245 U. S. 298, the state can prevent any possibility of evasion of its laws on the part of importers of foreign beer by requiring railroads to keep records,

open not only to the state but to every citizen of the state, giving all information that the state may require as to the source, quality and destination of beer brought into the state. The state is likewise free to impose any reasonable inspection burdens upon liquor brought within the state. As stated by the Court in *Turner* v. *Maryland*, 107 U. S. 38, 55:

> "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements."

The state is also free to impose whatever restraints it may wish to impose upon persons who import beer for resale within the state by imposing those restraints upon them in their character as sellers of such beer. Since importers are necessarily sellers, any regulations or restrictions which the State may choose to impose upon importers of foreign beer may be accomplished by imposing non-discriminatory regulations or restrictions upon all persons selling beer within the State. If California believes that a high tax will tend to cause a better quality of persons participating in the business of selling beer at wholesale, whether that beer be domestic or foreign beer, it can give effect to that belief by imposing a high tax upon wholesalers of beer, whether domestic or foreign. So far as policing beer is concerned, it is obvious that there can be no more reason to place a burdensome tax upon the business of buying and selling at wholesale foreign beers in order to

keep irresponsible persons from engaging in that business than there is to impose a burdensome tax upon the wholesalers of domestic beer for the purpose of keeping irresponsible persons out of that business. There being no proper basis in fact for such a distinction, to make such a distinction obviously discriminates against foreign beer and its manufacturers and dealers in favor of domestic beer and its manufacturers and dealers.

Unsound as are appellants' views on this phase of the argument, yet, assuming their contention that one engaged in the importation of beer into the state for sale at wholesale is in a position comparable to that of the manufacturer within the state, the Statute makes it clear that they do not obtain equal privileges for the same permit fee. The manufacturer, in addition to securing the privilege of producing beer within the state, has also the privilege of packaging, flavoring, coloring, labeling, exporting, and selling the same. An importing wholesaler, under both licenses required of him, has only the privilege of importing and selling. If he bottles or packages, he must pay a further license fee of $500. Thus, in order to secure rights comparable with those of the manufacturer, he must pay $1,050. This simply pursues the appellants' argument, unsound in its premise that an importing wholesaler is in a comparable position to a manufacturer, to the error of its conclusion independent of its fallacious premise.

The tax in question being a privilege or occupation tax, the equality of its burden is to be determined by the privilege obtained through its payments. The only difference between the privileges obtained under a wholesaler's license and the privileges obtained under both a wholesaler's license and an importer's license is the privilege of purchasing out-

side the state. Source of purchase thus measures the cost of the privilege. Source though justifying the provisions of the act designating who shall pay the barrel tax of 62½¢, levied on all beer sold in the state, furnishes no justification for a difference in the privilege tax, as pointed out in this argument.

The discrimination of the statute is direct and obvious. Its purpose and effect are to embarrass and discourage importers of beer manufactured outside the state.

POINT IV

THE ACT IS INVALID BECAUSE IT DENIES TO APPELLEES THE EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment guarantees to appellees the equal protection of the laws. While this guarantee does not preclude the states from resorting to classification for the purposes of legislation, it does require that the classification be reasonable, not arbitrary, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415. The classification must be founded upon real differences, as distinguished from artificial ones. *Colgate* v. *Harvey,* 296 U. S. 404, 423. The only difference between appellees who as wholesalers are required to pay license fees aggregating $550 and other wholesalers within the state who are required to pay $50 is the difference in the origin of the product which they handle. The product itself is the same, and in its geographical origin alone no such difference is found as will support a difference in legislative treatment.

The appellants do not contend that the classification created is not arbitrary or that it is based upon any real difference in the circumstances which determine the incidence of the liability. It is appellant's contention that the Fourteenth Amendment can under no circumstances furnish protection to one engaged in the business of selling intoxicating liquors. Appellants state, at page 28 of their brief:

> "In view of the repeated and emphatic declarations of the highest Court of our land, an attack on liquor laws as being in violation of the Fourteenth

> Amendment to the Federal Constitution hardly seems to merit serious consideration at this late date."

Extended consideration will not be given here to what rights may "at this late date" be claimed under the due process clause against purely arbitrary and unreasonable state legislation. Suffice it to say that, although the cases cited establish that the state may, when the subject matter be intoxicating liquor, adopt whatever measures are appropriate for the protection of the public morals, public health, or public safety, even to the extent of absolute prohibition, "it does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State." See *Mugler* v. *Kansas,* 123 U. S. 623, 661.

By the equal protection of the laws clause of the Fourteenth Amendment the power of the state as it is exercised over intoxicating liquors is restrained by the same principles as the power of the state is restrained when exercised over any other article, and the treatment of the persons within the same class must under the law be the same. See *Lloyd* v. *Dollison,* 194 U. S. 445, 447, 448; *Cox* v. *Texas,* 202 U. S. 446, 450. The nature of the subject of legislation respecting intoxicating liquors may justify a classification that could not be justified if the subject were any other commodity, but the nature of the subject matter does not change the nature of the constitutional limitation.

The case of *Cox* v. *Texas,* 202 U. S. 446, is cited to sustain a proposition broader than its holding and without regard to the express recognition of the Court that even in the case of liquor legislation it is proper for the Court to inquire whether the classification adopted denies

to any person the equal protection of the laws. The objections to the state legislation involved in that case were disposed of, not by the language quoted by appellants, but by the statement:

> "But, so far as we know, there is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things, which presumably all liquor sellers would prefer to be free to do. Therefore whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class" (p. 450).

Thus, the Court placed its decision upon the ground that there were not two classes of persons subject to different treatment but that the statute applied uniformly to all persons within any given class. The language quoted by appellant was used by the Court upon an issue of pleading and was intended to show that since the state statute had been assailed in the state court solely on the ground of conflict with the Fourteenth Amendment, the commerce clause could not be invoked to give the provisions of the Fourteenth Amendment a more extensive application than it would have when taken by itself. As the Court stated while discussing this question of pleading, the states are not restricted by the Fourteenth Amendment from enacting "statutes such as those before us", *i. e.*, statutes which, like the statute there before the Court, have been found to contain no arbitrary classification.

The ground on which the Court sustained the statute involved in *Cox* v. *Texas* is likewise made clear by the cases

cited. One such case is *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, in which this Court held valid an act which imposed an occupational tax upon refiners of sugar but which exempted refiners who manufactured sugar from cane of their own production. The theory sustaining such exemption is given expression in the following language of the Court:

> "But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth" (p. 92).

Reymann Brewing Co. v. *Brister,* 179 U. S. 445, another case cited to sustain the decision in *Cox* v. *Texas,* ap-

plies the same principle to a manufacturer selling at his plant the production of his factory as an incident to his business of manufacture.

Cox v. *Texas* and the cases supporting that decision have, therefore, no application here, since appellees are not attacking the failure of the California act to impose a tax upon local manufacturers for the privilege of selling their product, as distinguished from manufacturing it. The theory of those cases is that those engaged in the production and manufacture of an article constitute a distinct natural class from those engaged in its sale; that while a manufacturer of a product is also a seller thereof, such sale is incidental to the production or manufacture and that classification is to be determined not by its incidents but rather by its essentials. The classification adopted by the statute in this case applies the exact reverse of such principle. Wholesalers of both domestic and foreign beer in California engage in entirely identical business transactions. As an essential incident of the business of a wholesaler of foreign beer, the product which he handles crosses a state line. To base a classification upon this incident is clearly to base it upon an incident which has no relation to the essential nature of the business regulated, or to the protection of the public morals, the public health or the public safety. As well might the state classify wholesalers of intoxicating liquors upon the basis of what county lines the products which they handle cross, or require that persons selling liquor produced in the northeast and southwest corners of the state pay a higher tax for the privilege of doing business than those selling liquor produced in the northwest and southeast corners of the state. Such classifications, as the classification in the present case, would clearly be based

upon artificial differences and would fail to treat all persons similarly circumstanced alike.

This Court recently said in *Colgate* v. *Harvey*, 296 U. S. 404, 423:

> "As the Supreme Court of Vermont itself has pointed out, in all such cases it must appear not only that a classification has been made, but that it is one based on some reasonable ground. *State* v. *Hoyt*, 71 Vt. 59, 64-66; 42 Atl. 973. The decision in that case held invalid a state statute the effect of which was to impose a tax upon sales of goods manufactured in the state, while leaving sales of goods manufactured in other states free from taxation. It was held that the classification could not be based on any difference in the goods, because there was none; nor on the fact that they were made in different states, for that bore no just and proper relation to the classification, but was purely arbitrary; nor on the difference of residence of the manufacturers, for the same reason. And clearly the view of the court was that a like discrimination against the products of another state would have been open to the same objections."

The state may undoubtedly completely prohibit transactions in intoxicating liquor and adopt any lesser degree of regulation which it deems will promote public welfare, but it is equally obvious that the right to regulate even to the extent of prohibition does not permit regulation in a manner which arbitrarily discriminates between different classes of persons and which has no reasonable basis in fact. This principle is demonstrated in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389. In that case it was held that a statute taxing the gross receipts derived by corporations from their taxicab business within the state,

but which laid no like tax upon individuals and partnerships in the same business, was invalid as a denial of the equal protection of the laws, even as applied to a foreign corporation. The Court said:

> "The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution."
>
> * * * * * * * *
>
> "The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation" (pp. 400, 402).

The situation thus presented as to a foreign corporation is virtually the same as that presented here. While the state might, in the exercise of its police power, wholly deny the privilege of selling intoxicating liquor, yet, when it does permit such sale, it must treat each person engaging in the business on the basis of equality with others similarly situated. Failing to do this, the action of the state falls within the condemnation of the equal protection clause.

Because of the peculiar characteristics of intoxicating liquors the states have been permitted to regulate liquor and transactions in liquor to an extent not permitted in their regulation of other commodities. This unusual power of the state with respect to this peculiar commodity is permitted "for the protection of the public morals, the public health, or the public safety." *Mugler* v. *Kansas*, 123

U. S. 623, 661. Regulations of the state relating to liquor but not designed for the protection of the public morals, health, or safety, are therefore subject to limitations upon state power to the same extent as are regulations relating to any other commodity. It is obvious that the classification made by the statute now before this Court results in a discrimination which has no relation to furthering the public morals, health or safety. Appellants do not contend to the contrary. The classification here made follows no natural lines of distinction and attempts to deal arbitrarily with persons whose difference in situation furnishes no basis for difference in treatment. It thus falls within the condemnation of the equal protection clause of the Fourteenth Amendment.

POINT V

FINDING XV OF THE COURT BELOW IS FULLY SUPPORTED BY THE RECORD.

Finding No. 15 is sustained by the facts admitted. The fifteenth Finding of the court (R. 55), in substance finding that the imposition of an importer's license fee at each of plaintiff's points of distribution is a direct charge upon the beer imported and upon the prices at which it may be sold in the state, and, as such, a discrimination against beer manufactured outside the state in favor of beer manufactured within the state, is sustained by the record. The finding is no more than a statement of the conclusion which follows from the admitted facts. No proof was needed in support of the same as the burden falls upon the product in the manner found by the court as a matter of economic consequence. The thought is well expressed in *Brown* v. *Maryland,* 12 Wheat. 419, 444, in which this court uses the following language:

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made."

CONCLUSION

It is submitted that the decree of the court below should be affirmed.

Respectfully submitted,

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